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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHARTER FEDERAL SAVINGS BANK,
Petitioner,

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the sovereign's power to repudiate its contractual obligations entitle it to do so with impunity?

PARTIES TO THE PROCEEDING BELOW

Charter Federal Savings Bank was the plaintiff-appellee in the court of appeals. The Director of the Office of Thrift Supervision and the Federal Deposit Insurance Corporation were the defendants-appellants in the court of appeals.

RULE 29.1 LISTING

Petitioner Charter Federal Savings Bank has two wholly-owned subsidiaries: Charter Financial Services Corporation and Highlands Service Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Charter Federal Savings Bank ("Charter") respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in *Charter Federal Savings Bank v. Director, Office of Thrift Supervision et al.*, 976 F.2d 203 (4th Cir. 1992).

OPINIONS BELOW

The opinion of the court of appeals is reported at 976 F.2d 203 and reproduced at Appendix ("App.") 1a. The court of appeals denied Charter's Petition for Rehearing and Suggestion for Rehearing *In Banc*, which order is reproduced at App. 22a. The Memorandum and Order

of the United States District Court for the Western District of Virginia is reported at 773 F. Supp. 809 and reproduced at App. 24a. The district court's denial of both Charter's Motion for Clarification and the government's Motion for Reconsideration is reproduced at App. 62a.

JURISDICTION

The judgment of the court of appeals was rendered on September 25, 1992. Charter filed a timely Petition for Rehearing and Suggestion for Rehearing *In Banc*, which was denied on October 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

This case involves section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA" or "the Act"), Pub. L. No. 101-73, 103 Stat. 183 (codified at scattered sections of 12 U.S.C.), reproduced at App. 63a.

STATEMENT OF THE CASE

A. Posture of the Case

Petitioner seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit that affirmed in part and reversed in part a decision of the United States District Court for the Western District of Virginia. The district court, finding that petitioner entered into valid and binding contracts with the government, and further finding that FIRREA constituted an unexpected intervening act that frustrated the purpose of these contracts, ordered the contracts rescinded if respondent agencies took any enforcement action against Charter that substantially burdened Charter's operations, and which would not be taken but for the government's breach of the contracts. The Fourth Circuit reversed, finding that, if petitioner had a contract with the govern-

ment, the government had the right to alter or repudiate the contract "without consequence." *See* App. 4a.

B. Nature of the Case

Charter is a federal savings bank with offices throughout the 250 mile corridor between Knoxville, Tennessee and Roanoke, Virginia.[1] Charter, however, has been on the brink of being seized by federal regulators since the advent of this litigation.

The sole reason that federal regulators are poised to take the institution is that the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC"), the predecessor agencies to respondents Office of Thrift Supervision ("OTS") and the Federal Deposit Insurance Corporation ("FDIC"), respectively, entered into binding contracts with Charter in 1982 and 1985, and protections accorded to Charter in those contracts have since been rendered unenforceable by intervening legislation.

Specifically, the FHLBB and the FSLIC actively encouraged Charter to acquire four heavily undercapitalized savings associations in Virginia and neighboring Tennessee. One of the institutions, New Federal Savings and Loan ("New Federal"), had been formed by the FSLIC by combining the assets and liabilities from five failed savings and loan associations located in Tennessee. From the time of New Federal's inception, the institution was managed by a FSLIC-appointed receiver. Each of the other institutions would have been seized and liquidated had the agencies been unable to find a merger partner

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[1] The institution was chartered in 1920 as Interstate Building and Loan Association. It operated under the name First Federal Savings and Loan Association of Bristol from 1934 through 1982, at which time the institution was renamed Charter Federal Savings Bank. For purposes of clarity, "Charter" will be utilized hereinafter whenever referring to Interstate, First Federal, or Charter.

for them. For this reason, the agencies were desperate to have Charter acquire the troubled institutions. Indeed, while Charter assumed $62 million more in liabilities than assets as part of the transactions, the agencies avoided the imminent liquidations of these insolvent thrifts, and the concomitant payment of millions of dollars to insured depositors. Reduced to its essence, then, the acquisitions simply transferred the deficit net worth of these troubled institutions, and the associated burdens, from the government to Charter.

Charter, of course, did not assume this significant burden blindly. Recognizing the devastating impact the assumption of such liabilities would have on its own net worth, it acceded to respondents' requests to acquire these troubled thrifts only after negotiating from the agencies specific assurances that Charter would not need to recognize immediately the entire inherited deficit net worth. Rather, the parties agreed that Charter, for purposes of satisfying regulatory capital requirements, could treat the deficit net worth inherited from the acquired institutions as an intangible asset, called "supervisory goodwill," and amortize this asset over an agreed-upon number of years (40, 25 and 15 years, respectively).

The prolonged amortization period was the driving force of the deals, or, as Thurman Connell, the former Senior Vice President of Supervision of the Federal Home Loan Bank of Atlanta, acknowledged, "the engine that made th[ese] transaction[s] go," *see* Joint Appendix ("J.A.") (filed in court of appeals) 224, because it provided Charter the necessary time to absorb the substantial negative net worth of the acquired institutions. In fact, it has been undisputed throughout these proceedings that Charter never would have agreed to assume the liabilities of the acquired thrifts without this agreed-upon treatment of supervisory goodwill. Had Charter been required to recognize the deficit net worth immediately, it would have been

unable to satisfy the then-existing regulatory capital requirements and would have been subject to an immediate government takeover. As Mr. Connell conceded:

> [I]f Charter did not have the ability to [treat the inherited deficit net worth as an asset to be amortized over time], the merger from their perspective would not have made any sense whatsoever. It would have just placed them in jeopardy and they were viewed as a healthy institution at that time. *But to have taken on a merger of . . . sick thrifts without the ability to do this would have been nonsensical from a business point of view. They just would not have done it.*

J.A. 239-40 (emphasis supplied). Mr. Connell further acknowledged that the government recognized that it was entering into binding and enforceable agreements.

> Here we had an S&L that had agreed to take on a troubled thrift, but as really an incentive or prerequisite to their doing this, they had to have the ability to recognize the goodwill over a period of time . . . . The Bank Board approved it and *we had an agreement* at that time . . . .
>
> * * *
>
> *[A]t that time it became something that you no longer could change; that it was an understanding, an agreement between the parties, and the Bank Board had accepted it and they were willing to be bound by the terms that they had agreed to.*

J.A. 229, 230 (emphasis supplied).

From the time of the acquisitions until November, 1989, Charter, with the acquiescence of the agencies, treated supervisory goodwill as an intangible asset for all purposes. During this time, Charter increased its tangible net worth by more than $35 million. However, in August, 1989, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"),

Pub. L. No. 101-73, 103 Stat. 183, which, among other things, required respondents to exclude an institution's supervisory goodwill (except in extremely limited amounts) when calculating capital requirements under the Act. As a consequence, while Charter fully performed its obligations under the contracts, and while the respondents have reaped substantial benefits from Charter's performance, Charter has lost overnight approximately $47 million in regulatory capital (*i.e.*, the unamortized supervisory goodwill), leaving the institution technically undercapitalized and subject to an immediate government takeover.

C. Disposition of Courts Below

On February 4, 1991, Charter filed suit, alleging, *inter alia*, that Charter and the agencies entered into binding contracts in 1982 and 1985 and that FIRREA preserved rather than abrogated the contracts. Alternatively, Charter sought a declaration that FIRREA constituted an unexpected intervening act that frustrated the purpose of the contracts, and requested the district court to rescind these contracts.

On August 16, 1991, the district court issued its memorandum and opinion. After assuming jurisdiction pursuant to 12 U.S.C. §§ 1819(a) and 1464(d)(1)(A), App. 34a, the district court turned to the issue of whether the parties entered into a contract. The district court rejected respondents' argument that the FHLBB "unilaterally" decided to allow Charter to treat supervisory goodwill as a regulatory capital asset, instead finding that the parties had entered into a contractual relationship.

> Defendants do not want to recognize that the FHLBB had the discretion to allow or disallow the use of supervisory goodwill over the stipulated time for amortization. The inducement to allow it came, not from the mandate of a regulation, but the FHLBB's need for assistance from plaintiff's institution. This was consideration, and it is one of the essential ele-

> ments in the parties' legal relationship which characterizes it as contractual in nature. Had the FHLBB acted merely because it was following its own regulations, there would have been no consideration.

App. 45a-46a.[2]

The district court then analyzed the legislative history of FIRREA to determine whether Congress intended to abrogate or preserve preexisting contracts. While concluding that Congress's intent is not clear, the district court nonetheless found the respondents' interpretation of the legislation "plausible," and, therefore, deferred to the agencies' construction of the statute. App. 50a. Thus, having concluded that the parties entered into enforceable agreements, but that FIRREA rendered respondents' performance of the contracts impossible, the district court turned to the issue of rescission.

> Defendants want the court to apply a double standard by which they become the privileged party. Defendants want to be able to rescind and be absolved of their obligation to treat goodwill according to the accounting plans that the FHLBB approved; but they want plaintiff to be forced to possess the liabilities of the acquired thrifts and suffer the consequences of noncompliance with OTS's new capital standards. In

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[2] In concluding that the government's "need for assistance" was the moving force behind the deals, the district court relied on the agencies' own discovery responses and other documentary proof. For example, the FSLIC explicitly acknowledged that in considering the 1985 merger between a FSLIC-operated institution and Charter the agency was motivated by the "need to minimize the cost of financial assistance. . . ," and by its conclusion that "[t]he [m]erger would lessen the risk" to the agency. App. 27a (quoting FHLBB Resolution 85-223). The government also conceded that it found Charter's proposal for the 1982 merger of two failing thrifts attractive because Charter "agreed to merge without financial assistance." App. 28a (citing Defendants' Response to Plaintiff's First Set of Interrogatories).

> the absence of clear evidence to the contrary, this court does not believe the parties intended such a result when they made their agreement.

App. 53a. The district court, however, determined that respondents had not yet taken "concrete enforcement action" against Charter, thus rendering immediate rescission unavailable. App. 55a. The district court instead issued a declaratory judgment, declaring that the parties entered into binding contracts, and that any enforcement action taken by respondents that "substantially burdens [Charter's] operations," and which would not be taken but for respondents' breach of the contracts, will rescind the contracts. App. 58a-59a.

The agencies thereafter filed a motion for reconsideration, and Charter filed a motion for clarification, both of which were denied by order dated October 16, 1991. *See* App. 62a.

On September 25, 1992, the United States Court of Appeals for the Fourth Circuit affirmed in part and reversed in part the district court's decision. The panel addressed the government's jurisdictional challenges, agreeing with the government that Charter's claims against the FDIC were not ripe because that agency had not yet made "a definitive decision or ruling . . . with regard to petitioner." App. 13a. The Fourth Circuit, however, relying on 12 U.S.C. § 1464(d)(1)(a), determined that the district court properly exercised jurisdiction over the OTS.

On the merits, the court of appeals reversed. While assuming the existence of a contract between the government and Charter, the court of appeals, relying on this Court's decision in *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 52 (1986), concluded that any contract rights accorded to Charter "remain[ed] subject to subsequent legislation" unless the contract contained "unmistakable" language to the con-

trary. App. 19a (quoting *Bowen*, 477 U.S. at 52). Relying on this "special rule of contract construction," App. 18a, the Fourth Circuit concluded that the "OTS may enforce FIRREA's supervisory goodwill requirements against Charter *without consequence*." App. 4a (emphasis supplied).

On October 13, 1992, Charter filed a Petition for Rehearing and Suggestion for Rehearing *In Banc*, which the court of appeals denied on October 27, 1992.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S APPLICATION OF THIS COURT'S DECISION IN *BOWEN* DIRECTLY CONFLICTS WITH A RECENT DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The granting of Charter's petition is warranted because the court of appeals' application of the "unmistakability" doctrine directly conflicts with a recent decision from the United States Court of Appeals for the Ninth Circuit.

The Fourth Circuit has interpreted this Court's decision in *Bowen*, 477 U.S. 41, to mean that the government can repudiate—"without consequence"—any contract to which it is a party unless the contract contains unmistakable language to the contrary. *See* App. 4a. In *Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992), a unanimous court disagreed, concluding that *Bowen* does not allow the government to repudiate contracts with impunity. Ironically, the Ninth and Fourth Circuits relied on the same language in *Bowen* in reaching their respective decisions: that "the sovereign's power to enact subsequent legislation affecting its own contractual arrangements endures, albeit with some limitations, unless surrendered in unmistakable terms." *Id.* at 1385 (citation omitted). The Ninth Circuit, however,

concluded—as Charter did in its briefs—that this language only prevents parties from obtaining injunctive relief that would tie Congress's hands and prevent the passage and effectuation of new legislation. Distinguishing *Bowen*, the Ninth Circuit recognized that the plaintiffs in *Alpine Ridge* did "not challenge Congress's power to amend the terms of the underlying legislation." [3] *Id.* The plaintiffs instead sought only a *remedy* to compensate them for Congress's decision to breach. On this basis, the Ninth Circuit held that Congress "unconstitutionally abrogate[d] the owners' vested property rights in violation of the fifth amendment" and affirmed an award of damages. *Id.* at 1388. The *Alpine Ridge* Court's decision is thus faithful to *Bowen* by permitting Congress to exercise its sovereign powers without constraint but is also consistent with other Supreme Court precedent by finding that the injured party's right to a remedy is secure.

On November 16, 1992, this Court granted certiorari in *Alpine Ridge*, *see Kemp, Secretary of HUD, et al. v. Alpine Ridge Group, et al.*, No. 92-551, 113 S. Ct. 490 (Nov. 16, 1992), thereby according this Court an opportunity to address the *Bowen*-related issues raised herein in the very near future. Thus, if this Court is not inclined to grant Charter's petition at this time, Charter respectfully requests that this Court defer consideration of the petition until it decides *Alpine Ridge*. If this Court affirms the Ninth Circuit's application of *Bowen*, the circumstances would justify, and Charter would request, a remand of the instant case to the court of appeals below.

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[3] Likewise, Charter has consistently recognized Congress's power to amend or repeal the legislation underlying its contracts with the government. Like *Alpine Ridge*, however, Charter contends that its contract rights, supported by independent consideration, require the government to remedy its breach.

II. THE FOURTH CIRCUIT'S APPLICATION OF THIS COURT'S DECISION IN *BOWEN* DIRECTLY CONFLICTS WITH OTHER FEDERAL COURT DECISIONS

The court of appeals' decision also conflicts with a string of recent decisions by the Chief Judge of the United States Claims Court. *See Statesman Sav. Holding Corp. v. United States*, 26 Cl. Ct. 904 (1992); *Winstar Corp. v. United States*, 25 Cl. Ct. 541 (1992); *Winstar Corp. v. United States*, 21 Cl. Ct. 112 (1990). The facts in these cases are identical to the facts before this Court, other than the remedy sought. (The Claims Court plaintiffs seek damages; Charter seeks rescission.) The Claims Court consistently has rejected the government's —and the Fourth Circuit's—interpretation of *Bowen*, concluding instead that while Congress is free to pass legislation that conflicts with its contractual obligations, "the government must still honor the rights of its citizens." *Winstar*, 25 Cl. Ct. at 548. The Chief Judge of the Claims Court concluded:

> The assertion that, in order to freely regulate, the government must have the power to disregard the rights and interests of its citizens is a novel proposition that finds no support in the legislative history of FIRREA, or for that matter, in our constitutional tradition. . . . Although [*Bowen*] and well-developed case law makes it clear that the government is at all times free to legislate, that freedom is inherently constrained by the government's obligation to honor its prior contractual commitments, especially when the government has received a benefit.

Id. at 548-49. *See also Winstar*, 112 Cl. Ct. at 115; *Statesman*, 26 Cl. Ct. at 919-21.

The government has appealed these decisions, which are now before the United States Court of Appeals for the Federal Circuit in a consolidated appeal. Briefing is complete, argument is set for January 6, 1993, and a

decision is expected this Spring. If the Federal Circuit affirms the Chief Judge's decisions, Winstar, Glendale and Statesman—and the other twenty-seven supervisory goodwill-related cases now before the Claims Court [4]—will almost certainly be awarded substantial damages. Charter, however, would be denied any remedy and remain subject to an immediate government takeover merely because of its choice of forum.

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[4] *The Adam Corporation Group v. United States*, No. 92-707C (complaint filed Oct. 13, 1992); *American Heritage Bancorp v. United States*, No. 90-3982C (complaint filed Dec. 3, 1990); *Anderson v. United States*, No. 91-34C (complaint filed Oct. 10, 1991); *Bailey v. United States*, No. 92-817C (complaint filed Nov. 30, 1992); *Barron Bancshares, Inc. v. United States*, No. 90-830C (complaint filed Aug. 28, 1990); *California Federal Bank v. United States*, No. 92-138C (complaint filed Feb. 28, 1992); *Castle v. United States*, No. 90-1291C (complaint filed Sept. 25, 1990); *Citizens Federal Bank v. United States*, No. 92-656C (complaint filed Sept. 22, 1992); *Coast Federal Bank v. United States*, No. 92-466C (complaint filed July 9, 1992); *Franklin Federal Savings Bank v. United States*, No. 92-739C (complaint filed Oct. 21, 1992); *Glass v. United States*, No. 92-0428C (complaint filed June 25, 1992); *Globe v. United States*, No. 91-1550C (complaint filed Oct. 29, 1991); *Home Savings of America v. United States*, No. 92-620C (complaint filed Sept. 4, 1992); *Hometown Financial Inc. v. United States*, No. 90-843C (complaint filed Aug. 30, 1990); *Hughes v. United States*, No. 90-878C (complaint filed Sept. 4, 1990); *Karnes County Savings Association v. United States*, No. 91-993C (complaint filed March 7, 1991); *LaSalle Talman Bank v. United States*, No. 92-652C (complaint filed Sept. 21, 1992); *LaVan v. United States*, No. 90-581C (complaint filed June 28, 1990); *Long Island Savings Bank, F.S.B. v. United States*, No. 92-517C (complaint filed Aug. 3, 1992); *Northeast Savings, F.A. v. United States*, No. 92-550C (complaint filed Aug. 12, 1992); *Old Stone Bank v. United States*, No. 92-647C (complaint filed Sept. 16, 1992); *Republic Savings Bank, F.S.B. v. United States*, No. 92-265C (complaint filed April 13, 1992); *Secor Bank, F.S.B. v. United States*, No. 92-247C (complaint filed April 8, 1992); *Security Savings and Loan Association v. United States* No. 92-577C (complaint filed Aug. 7, 1992); *Smith v. United States*, No. 92-540C (complaint filed Aug. 7, 1992); *Suess v. United States*, No. 90-981C (complaint filed Sept. 14, 1990); *Western Federal Savings and Loan Association v. United States*, No. 92-820C (complaint filed Nov. 30, 1992).

Similarly, the Ninth, Tenth and Second Circuits will be reviewing this year three federal district court decisions holding that rescission is an appropriate remedy under the identical circumstances here. *See Far West Federal Bank, S.B. v. Director, Office of Thrift Supervision*, 787 F. Supp. 952 (D. Or. 1992); *Security Federal Savings and Loan Association of Albuquerque v. Federal Savings and Loan Insurance Corporation*, 796 F. Supp. 1435 (D.N.M. 1991); *Ensign Financial Corporation v. Federal Deposit Insurance Corporation*, 785 F. Supp. 391 (S.D.N.Y. 1992). While the government no doubt will reiterate to the respective courts of appeals its position that the government may repudiate "without consequences" its contractual obligations, the Ninth Circuit has already rejected this argument in *Alpine Ridge*, thereby plainly foreshadowing an affirmance of the district court's decision in *Far West*.

By granting the petition, and resolving the issue, this Court can resolve the current conflict in the federal judiciary and determine whether the well-established principle that private contracts "remain subject to subsequent legislation" permits the government to repudiate its own contractual obligations with impunity.

III. THE COURT BELOW ERRONEOUSLY DECIDED THE ISSUE PRESENTED TO THIS COURT

A. The Unmistakability Principle, Properly Applied, Permits The Sovereign To Breach Contracts Pursuant To Its Police Powers But Nonetheless Accords A Remedy To The Injured Party

The court of appeals relied on *Bowen* for the proposition that contracts "remain subject to subsequent legislation," and that courts should be reluctant to "surrender a sovereign power . . . that serves to implement a comprehensive social welfare program affecting millions of individuals throughout our Nation." App. 19a (quoting *Bowen*, 477 U.S. at 53). Until now, this lan-

guage merely stood for the sensible and unremarkable proposition that the sovereign always remains free to exercise its police powers, even if exercise of such powers has the effect of repudiating contractual obligations of the government. The court of appeals, however, has greatly expanded the principle, thereby creating a new doctrine that, if left intact, would not only allow the government to breach a contract, but would also allow the government to do so without affording a remedy to the injured party. The court of appeals' application of *Bowen* was error and should be reversed.

Charter recognizes that, unless contracted away in "unmistakable" terms, the government retains the authority to exercise its sovereign powers—even if the exercise of that power breaches the government's commitment to a private party. Recognizing and giving force to this language, however, does not absolve the government of its obligation to compensate, or otherwise to provide a remedy to, the injured party.

A close reading of *Bowen* supports Charter's interpretation of the unmistakability doctrine. In *Bowen*, this Court relied upon the principle that "sovereign power . . . is an enduring presence that governs all contracts" to support its conclusion that "Congress had the *power* to *amend*" a section of the Social Secuirty Act, which had previously accorded certain rights to those states who wished to participate in the Social Security Program. 477 U.S. at 52 (emphasis supplied). Significantly, this Court's conclusion that Congress had the *power* to repudiate government commitments did not end the matter. Instead, this Court went on to analyze—in a subsequent section of the opinion—whether the plaintiff was entitled to a remedy, *see* 477 U.S. at 54-56, a step the court of appeals below apparently deemed unnecessary.

While this Court eventually denied the plaintiff in *Bowen* a remedy to compensate it for Congress's decision to take away a right it had once accorded, the basis for

this Court's holding did *not* rest on the language relied upon by the court of appeals below. Rather, this Court simply concluded that the plaintiff's "rights" were not derived by bargaining, or by the exchange of consideration, and therefore could not be deemed contractual in nature. *Id.* Here, in contrast, the court of appeals assumed for purpose of its analysis the existence of a binding contract between Charter and the government. Charter submits, and courts have recognized, that this distinction is crucial in determining whether the injured party is entitled to a remedy.[5] The court of appeals' failure to recognize this distinction and address the issue of remedy was therefore error.

B. The Court Of Appeals' Application Of The Unmistakability Principle Is Inconsistent With Other Supreme Court Precedent

The Fourth Circuit once before imposed a rule of contract construction that imputed to plaintiffs knowledge that legislation would alter their bargained-for rights, and determined that the plaintiff had no remedy for his resulting loss. In that case, however, this Court vacated the panel's decision, indicating strong fundamental disagreement with the Fourth Circuit's conclusions.

In *Carini v. United States*, 528 F.2d 738 (4th Cir. 1975), *vacated*, 432 U.S. 902 (1977), the Fourth Circuit concluded, first, that Congress intended to eliminate cer-

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[5] *See Alpine Ridge*, 955 F.2d at 1386 (emphasis in original) ("If the asserted right is a benefit gratuitously conferred by statute, as in *Bowen*, the repeal or amendment of that statute is not subject to a substantive due process claim. The owners here, however, have bargained-for *contract* rights, supported by independent consideration," thereby entitling plaintiffs to a remedy); *Winstar*, 25 Cl. Ct. at 546 ("[T]he facts of [*Bowen*] make it clear that the provisions of the Social Security Act were not promulgated after negotiations, arm's length or otherwise. . . . There was [also] no legal consideration for the creation of these 'rights.' At any time, the government could revoke them without legal consequence because the plaintiffs had not bargained for their creation.").

tain contractual bonuses to which certain naval servicemen were entitled, and, second, that Congress was entitled to alter the contracts with impunity. In language echoing that found in *Charter*, the Fourth Circuit found that "[w]hile a court might reasonably hold the Navy bound by its representation, it cannot bind congressional power in areas committed to congressional discretion." *Id.* at 741 n.7. The court of appeals further determined —again in language almost identical to that found in *Charter*—that "in a legal sense [plaintiffs] must be held to an awareness that Congress might change the statutes." *Id.* at 741. As noted above, this Court vacated the Fourth Circuit's holding in *Carini*, *see* 432 U.S. 902 (1977), in light of *United States v. Larionoff*, 431 U.S. 864 (1977).

In *Larionoff*, this Court reviewed the identical issues addressed by the *Carini* Court but reached a far different conclusion. This Court held that Congress never intended to eliminate the bonuses retroactively and, therefore, never had to reach the issue of whether a remedy would be available "if Congress had such an intent." 431 U.S. at 879. Nonetheless, this Court seemed to reject any notion that the government reserves the power to withdraw a contractual promise with impunity, noting instead that legislation affecting vested contractual rights would present "serious constitutional questions." *Id.*

This Court's language in *Larionoff* has its roots in earlier Supreme Court cases that consistently found the government liable for legislation that repudiated its own contractual obligations. In *Perry v. United States*, 294 U.S. 330, 353-54 (1935), for example, this Court found that legislation renouncing the United States' contractual obligation to reimburse plaintiff the "principle and interest" noted in a bond "in United States gold coin of the present standard value" breached the parties' contract. "Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce

expenditures by abrogating contractual obligations of the United States." *Id.* at 352. Even though there was no—much less unmistakable—language in the bond prohibiting Congress from altering its terms in the future, this Court nonetheless concluded that the plaintiff was entitled to an award of damages.

Similarly, this Court, in *Lynch v. United States*, 292 U.S. 571 (1934), found that legislation that repudiated the government's contractual obligations required payment of just compensation. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." *Id.* at 580 (quoting *Sinking-Fund Cases*, 99 U.S. 700, 719 (1878)).[6] This Court again reached its conclusion notwithstanding the lack of any contractual language expressly precluding Congress from altering the terms of the original contracts.[7]

C. The Court Of Appeals' Expansion Of The Unmistakability Principle Would Render Virtually Every Government Contract Illusory And Unenforceable

By reading into the contract a term that permits Congress to repudiate any of the government's contractual obligations at any time and with impunity, the expanded

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[6] This Court explicitly held in *Sinking-Fund* Cases that Congrses may not "take away property already acquired under the operation of a charter," 99 U.S. at 720, a principle also recognized in *Bowen*. 477 U.S. at 55. This Court further held that while "Congress retains the right of amendment," it must exercise this right "in a manner *not inconsistent* with the requirements of the original" charter. 99 U.S. at 730 (emphasis supplied).

[7] *See also United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 9-10 (1977) (finding that neither New York nor New Jersey could abrogate the terms of bonds held by private citizens notwithstanding the absence of contractual language expressly prohibiting the states from doing so).

"special rule of contract construction" renders Charter's contract, and *every other* government contract, illusory and unenforceable. This Court, however, echoing the words of Alexander Hamilton, long ago made clear that "[i]t is against the rules, both of law and reason, to admit by implication in the construction of a contract a principle which goes in destruction of it." *Murray v. Charleston*, 96 U.S. 432, 445 (1877). *See also Walsh v. Schlecht*, 429 U.S. 401, 408 (1977). Indeed, the sort of construction urged by the government here, *i.e.*, that the government promised Charter that its supervisory goodwill could be treated as a regulatory capital asset, but that the government reserved its prerogative to alter or withdraw that promise, has already been rejected by this Court. In *Murray*, this Court determined that "[a] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." 96 U.S. at 445.

D. The Court Of Appeals' Reliance On *Transohio* And *Guaranty* Is Misplaced

In addition to *Bowen*, the court of appeals relied on *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992), and *Guaranty Fin. Serv., Inc. v. Ryan*, 928 F.2d 994 (11th Cir. 1991), for its interpretation of the unmistakability principle. While Charter disagrees with some of the D.C. Circuit's *dicta*, *see Statesman*, 26 Cl. Ct. at 919 (finding that the D.C. Circuit "severed the doctrine from its historic moorings"), application of the doctrine was at least arguable in that case because the plaintiff sought *injunctive relief* that would have prohibited Congress from excluding that institution's supervisory goodwill as now required by FIRREA. In stark contrast, Charter recognizes that Congress has the power to exclude the institution's supervisory goodwill, but submits that the legislation justifies rescission of the contracts.[8]

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[8] Perhaps recognizing the severity and scope of its decision, the D.C. Circuit—in response to Transohio's Request for Rehearing and

With respect to *Guaranty*, another case in which the plaintiff sought *injunctive* relief, the Third Circuit's determination that the contract only allowed the institution to "treat supervisory goodwill as regulatory capital so long as the regulat[ion] remained as it was when the contract was signed" merely reiterated the *express* terms of the particular contract.[9] 928 F.2d at 999. But while the plaintiff in *Guaranty* had "express notice that the regulatory scheme could change and therefore alter [its] obligations," *see id.*, Charter never agreed—nor would it have agreed—to make its use of supervisory goodwill contingent on the regulations remaining unchanged.

In sum, *Lynch*, *Perry*, *Bowen* and *Larionoff* provide that, absent unmistakable language to the contrary, the sovereign may exercise its police powers regardless of its contractual obligations. Where this exercise repudiates a contract, however, the sovereign is required to remedy that breach. Charter submits that, under Supreme Court precedent, Congress is free to repudiate the government's contractual obligations to Charter, but that Charter, in turn, is entitled to its requested remedy.

IV. QUESTION PRESENTED IS OF SIGNIFICANT NATIONAL IMPORTANCE

Only issues of war and peace have dominated the national agenda more than the "savings and loan crisis," which the Bush Administration estimated may cost as much as $500 billion. Congress has wrestled with the crisis by holding months of hearings in which high officials of the Department of the Treasury, the Office of the

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Suggestion for Rehearing *En Banc*—has requested additional briefing.

[9] The parties in *Guaranty* stated in writing that "[a]ll references to regulations . . . include any successor regulation thereto, it being expressly understood that subsequent amendments may increase or decrease the Acquiror's obligation under this Agreement." *See* 928 F.2d at 999.

Comptroller of the Currency, the OTS and the FDIC have appeared to address the potential cost of the bailout, its impact on the economy, the availability of credit, as well as other relevant issues of national importance.

This case presents an important question of federal law —whether Congress, in its effort to address the savings and loan crisis—may repudiate government contractual obligations with impunity. In this instance, a healthy and viable institution took the government at its word, and agreed to assume $62 million of liabilities in excess of assets in exchange for the bargained-for right to treat this deficit as an intangible asset to be amortized over a specified period of time. Reliance on the government's word—at least absent action by this Court—will no doubt result in seizure of the institution.

The irony, of course, is that Charter, far from being part of the problem, has been part of the solution. In 1982 and again in 1985, when the regulators were seeking a merger partner for insolvent institutions so that the government would not have to foot the bill for the thrifts' failures, they turned to Charter. While Charter first declined the government's overtures because the government's proposed transaction would not have been financially prudent, *see* App. 5a, Charter eventually agreed to the deals, but only after first securing the guarantees that now have been rendered meaningless. *Id.*

The government's actions, and the Fourth Circuit's application of *Bowen*, leave Charter, and the other "white knights" of the industry, in an untenable position. After fully performing their contractual obligations, absorbing the significant negative net worth of failed institutions, and recapitalizing the failed institutions, Charter and other acquiring thrifts are faced with restrictions and threats of seizure.

The message has not been lost in the private sector. While everyone seems to recognize that "[p]rivate capital

is the taxpayer's cushion . . ., ultimately reducing the bail-out's cost to taxpayers," the regulators' unusual way of saying "thank you" to institutions like Charter only serves to scare off potential new investors and much needed private capital. *See*, Wayne, Investors Decline Government Deals For Failed S&L's, *New York Times*, Nov. 14 1990, at 1, col. 1. Investors, knowledgeable of the regulators' treatment of recapitalized thrifts, are wary of dealing with the government, recognizing that "the contract you negotiate could be upset if the political winds change." *Id.* Indeed, the government has found it "almost impossible to sell failed savings institutions to private investors," in part, because investors "do not trust the Government as a business partner." *Id.*

The instant petition provides this Court an opportunity to determine whether parties who contract with the government have a remedy—or are instead literally at the government's mercy—if Congress, after the fact, decides that it is no longer in the government's interest to adhere to the terms of the agreement.

CONCLUSION

For the reasons stated herein, a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be issued and the case set for plenary review.

Respectfully submitted,

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Dated: January 2, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-2647

CHARTER FEDERAL SAVINGS BANK,
Plaintiff-Appellee,

v.

OFFICE OF THRIFT SUPERVISION, Director, in his own official capacity and as successor in interest of Federal Home Loan Bank Board; FEDERAL DEPOSIT INSURANCE CORPORATION, in its own capacity and as successor in interest to Federal Savings and Loan Insurance Corporation,

Defendants-Appellants.

No. 91-2708

CHARTER FEDERAL SAVINGS BANK,
Plaintiff-Appellee,

v.

OFFICE OF THRIFT SUPERVISION, Director, in his own official capacity and as successor in interest of Federal Home Loan Bank Board; FEDERAL DEPOSIT INSURANCE CORPORATION, in its own capacity and as successor in interest to Federal Savings and Loan Insurance Corporation,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Virginia, at Abingdon.
Glen M. Williams, Senior District Judge
(CA-91-12-A)

Argued: March 2, 1992

Decided: September 25, 1992

Before RUSSELL, Circuit Judge,
BUTZNER, Senior Circuit Judge, and SIMONS,
Senior United States District Judge for the
District of South Carolina, sitting by designation

Affirmed in part and reversed in part by published opinion. Judge Russell wrote the opinion, in which Senior Judge Butzner and Senior Judge Simons joined.

COUNSEL

ARGUED: Aaron Baer Kahn, Assistant Chief Counsel, OFFICE OF THRIFT SUPERVISION, Washington, D.C., for Appellant OTS; Jacob Matthew Lewis, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant FDIC. Thomas Matthews Buchanan, WINSTON & STRAWN, Washington, D.C., for Appellee. ON BRIEF: Harris Weinstein, Chief Counsel, Thomas J. Segal, Associate Chief Counsel, David H. Enzel, Senior Trial Attorney, Laurie Romanowich, OFFICE OF THRIFT SUPERVISION, Washington, D.C., for Appellant OTS; Stuart M. Gerson, Assist-

ant Attorney General, Douglas Letter, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; E. Montgomery Tucker, United States Attorney, Roanoke, Virginia; Thomas A. Schulz, Assistant General Counsel, Loretta R. Pitt, Senior Counsel, Colleen Bombardier, Senior Counsel, Thomas L. Holzman, FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C., for Appellant FDIC. Eric W. Bloom, WINSTON & STRAWN, Washington, D.C., for Appellee.

OPINION

RUSSELL, Circuit Judge:

The Office of Thrift Supervision (OTS) and the Federal Deposit Insurance Corporation (FDIC), defendants in the action below, appeal on jurisdictional and substantive grounds the district court's declaratory judgment in this case. At issue here is whether enforcement of the strict capital requirements of the recently enacted Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in various sections of 12 U.S.C.), abrogates prior agreements permitting use of supervisory goodwill as capital. The district court ruled that the Federal Home Loan Bank Board (FHLBB), predecessor of OTS, had contracted with Charter Federal Savings Bank (Charter) to permit Charter to treat supervisory goodwill as an asset for statutory capital reporting requirements in return for Charter's acquisition of certain failing thrifts. Subsequent to entering into the contracts, Congress enacted FIRREA, which severely restricted use of supervisory goodwill as capital. The court decided that if OTS were to enforce FIRREA's more restrictive capital requirements and if its enforcement substantially burdened Charter's operations, Charter could rescind the contracts and, consequently, rescind its acquisitions of failing thrifts.

We affirm the district court's jurisdiction to decide this case, except as to the FDIC as a party. We conclude that the claims as against the FDIC are not ripe for review and, therefore, dismiss it as a party. We reverse the district court's decision on the merits and hold that the FHLBB did not contractually obligate itself (or its successor agencies) to permit Charter to use supervisory goodwill to meet capital requirements in the face of contrary new regulations. Therefore, OTS may enforce FIRREA's supervisory goodwill requirements against Charter without consequence.

I.

Around 1980, in response to the large number of financially troubled savings and loan institutions, the FHLBB began encouraging healthy financial institutions to acquire financially troubled thrifts. *See Transohio Sav. Bank v. Director, Office of Thrift Supervision*, No. 91-5246, slip op. at 4-8 (D.C. Cir. June 12, 1992) (detailing history of 1980 savings and loan industry crisis). As a cost-saving alternative to previously offered cash incentives, the FHLBB, within its authorized discretion, offered to permit acquiring institutions to treat the negative net worth of the acquired thrift as an intangible asset, called supervisory goodwill. Supervisory goodwill could then be amortized against income over a period of time up to forty years. Treating supervisory goodwill as an asset enabled acquiring institutions, which would have had negative actual net worth after taking on a troubled thrift, to meet regulatory capital requirements for a number of years until they could absorb the negative net worth of the acquired thrift. H.R. Rep. No. 54(V), 101st Cong., 1st Sess. 26-27, *reprinted in* 1989 U.S.C.C.A.N. 409-10.

In June 1981, agents of the Atlanta Federal Home Loan Bank (FHLB) contacted Charter in an effort to persuade Charter to acquire First Federal Savings &

Loan Association of New River Valley (New River). New River had a deficit net worth of $13.5 million. Charter initially declined to pursue the merger because it considered the merger financially imprudent.[1] Several months later, supervisory agents again contacted Charter. This time they encouraged Charter to acquire both New River and Peoples Federal Savings and Loan Association (Peoples). Through negotiations, the FHLB agents assured Charter that it could treat the combined negative net worth of these two thrifts ($47.1 million) as supervisory goodwill and armortize it over forty years. Charter then agreed, but only after receiving permission to use the purchase method of accounting[2] and thereunder treat supervisory goodwill as an intangible asset.

Charter signed a merger agreement with the two acquired institutions dated December 8, 1981. The FHLBB subsequently approved the merger through a written resolution, subject to several conditions. One of those conditions was:

> That [Charter] shall furnish analyses, accompanied by a concurring opinion from its independent accountant, satisfactory to the Supervisory Agent and to the Office of Examinations and Supervision, which (a) specifically describe, as of the effective date of the merger, any intangible assets, including goodwill, or discount on assets arising from the merger to be recorded on [Charter's] books and (b) substantiate

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[1] At that time, Charter had a positive net worth of only $7.69 million. Thus, it could not have fully absorbed the $13.5 million negative net worth of New River.

[2] Under the purchase method of accounting, assets are valued at fair market value on the date of sale. For example, a $100,000 mortgage loan with a fixed 9% interest rate would be valued at a discount if current interest rates were higher than 9%, or at a premium if current interest rates were lower. A resulting positive net worth would be capitalized as goodwill and depreciated; a resulting negative net worth would be treated as an asset (supervisory goodwill) and amortized against income.

> the reasonableness of amounts attributed to intangible assets, including goodwill, and the discount of assets and the related amortization periods and methods[.]

(J.A. at 53.) In response, Charter's independent accountant, A.M. Pullen & Co., submitted a letter detailing Charter's method of accounting for the merger. The letter described Charter's treatment of negative net worth as follows:

> (9) The difference between the fair values . . . of New River's and People's assets less liabilities were recorded as intangible assets and goodwill.
>
> In evaluating the factors prescribed by generally accepted accounting principles and the guidelines described in FHLB Memorandum R-31(b), goodwill will be amortized over forty years. The straight-line method of amortization will be used.

(J.A. at 61.) The FHLBB accepted Charter's treatment of the acquired negative net worth as supervisory goodwill and formally approved the merger. Charter has since treated the supervisory goodwill as an asset for regulatory capital requirements, offsetting an amortized amount each year from income without objection from the FHLBB.[3]

In early 1985, the FHLB again approached Charter about acquiring a failing thrift, New Federal Savings and Loan (New Federal).[4] Charter agreed, conditioned

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[3] When Charter converted from a mutual to a federal stock savings and loan association in 1984, it informed prospective investors of the accounting arrangement. As part of the conversion arrangements with the government, Charter reduced the amortization period from 40 years to 25 years.

[4] New Federal was actually a combination of five failed thrifts located in Tennessee, packaged as one institution by the FSLIC and managed by an FSLIC-appointed receiver.

upon obtaining the same terms as governed the 1982 acquisition. That is, Charter conditioned acquisition on *inter alia* permission to treat supervisory goodwill as an asset for purposes of capital regulatory requirements. At the time of the acquisition, New Federal had negative net worth of approximately $15 million.

As in the previous transaction, Charter signed a merger agreement with New Federal and received subsequent approval of the merger by resolution of the FHLBB. Charter's independent accountants again submitted a letter to the FHLBB describing the method of accounting for the merger and specifically outlining treatment of supervisory goodwill as an asset to be amortized over fifteen years. The FHLBB issued a forbearance letter to Charter stating that the FHLBB would not enforce any net worth requirements for a period of five years (until 1990), provided that deficiencies in those requirements were due to the acquisition of New Federal.

Later that year, the FHLBB approached Charter about acquiring yet another thrift, Magnolia Federal Savings and Loan Association (Magnolia). Magnolia had nominal negative net worth of approximately $24,000. The acquisition was consummated in June 1985, on substantially the same terms as the prior acquisitions. Charter treated the $24,000 as supervisory goodwill, amortized over fifteen years, which it listed as an asset on its subsequent monthly reports to the FHLBB.

Congress enacted FIRREA in August 1989, seven years after Charter's first acquisition. One purpose of FIRREA was to restore public confidence in the savings and loan industry by strengthening the soundness of individual institutions. Pub. L. No. 101-73, § 101(2), 103 Stat. at 187; H.R. Rep. No. 54(I), 101st Cong., 1st Sess 307, *reprinted in* 1989 U.S.C.C.A.N. 86, 103. Congress, therefore, imposed uniformly applicable, strict capital requirements on all savings associations. Section 301(t) of FIRREA mandated that the OTS promulgate regulations no later than

ninety days after August 9, 1989, requiring savings and loan institutions to (1) maintain "core capital" as defined in the statute in an amount not less than 3 percent of the institution's assets; a specified, limited amount of supervisory goodwill can be used in calculating core capital; (2) maintain "tangible capital" in an amount not less than 1.5 percent of the institution's assets, which cannot include supervisory goodwill; and (3) maintain "risk-based capital" in an amount not materially less than that required for national banks. 12 U.S.C. § 1464(t) (Supp. II 1990). The resulting OTS regulations permit savings institutions to include only minimal amounts of supervisory goodwill to meet core capital and risk-based capital requirements, subject, however, to a five-year total phase-out schedule set forth in § 301(t)(3)(A), 12 U.S.C. § 1464(t)(3)(A).[5] 12 C.F.R. §§ 567.5(a), .6 (1992).

An institution that fails to meet FIRREA's new capital standards must submit a plan to the OTS "describ[ing] the manner in which the savings association will increase its capital so as to achieve compliance with capital standards." 26 U.S.C. § 1464(t)(6)(A)(ii)(II) [sic]. Since Charter did not meet the new requirements,[6] it submitted a capital plan on January 5, 1990, with revisions submitted March 30 and November 8 of that year. The

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[5] Section 301(t)(3)(A) provides:

> The amount of qualifying supervisory goodwill that may be included may not exceed the applicable percentage of total assets set forth in the following table:
>
> | For the following period: | The applicable percentage is: |
> |---|---|
> | Prior to January 1, 1992 | 1.500 percent |
> | January 1, 1992-December 31, 1992 | 1.000 percent |
> | January 1, 1993-December 31, 1993 | 0.750 percent |
> | January 1, 1994-December 31, 1994 | 0.375 percent |
> | Thereafter | 0 percent |

[6] With supervisory goodwill excluded, Charter had a negative net worth of approximately $19 million.

OTS disapproved Charter's plan because it did "not adequately address the institution's need for capital" and it was based on "optimistic operating projections." (J.A. at 17.) The OTS also refused to grant Charter a discretionary exemption pursuant to § 1464(t)(7). Consequently, the OTS imposed statutorily mandated restrictions prohibiting Charter from making any new loans or investments except with the prior written approval of the OTS.[7] In addition, OTS requested that Charter sign within fifteen days a Consent Agreement authorizing the appointment of a conservator or receiver to negotiate a plan of merger or reorganization on behalf of Charter. *See* § 1464(d)(2)(B) (authorizing OTS to appoint a conservator or receiver where board of directors consents). Charter refused to sign the Consent Agreement.

Charter then brought an action in the district court for declaratory judgment and injunctive relief against OTS and the Federal Deposit Insurance Corporation (FDIC). The complaint alleged that Charter and the federal agencies (or their predecessors) entered into binding contracts in the course of the 1982 and 1985 acquisitions, in which the FHLBB had promised Charter continued use of supervisory goodwill to meet capital regulatory requirements for specified amortization periods. Based on this allegation, Charter sought several alternative declarations from the court, *inter alia*: (1) that § 401(g) of FIRREA, which preserves the obligations of the FHLBB incurred prior to enactment of FIRREA, obligates the OTS to abide by prior contractual promises to Charter regarding supervisory goodwill; or (2) in the event that FIRREA mandates enforcement of its capital requirements without exception, that FIRREA

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[7] Under FIRREA, the OTS must restrict the asset growth of noncomplying institutions. 12 U.S.C. § 1464(t)(6)(B)(i). FIRREA also requires the OTS to issue capital directives to noncomplying institutions, which may include dividend and compensation restrictions. § 1464(t)(B)(ii).

constitutes an intervening act which frustrates the purpose of the contracts, permitting rescission; or (3) that abandoning contractual promises constitutes a taking. The OTS countered that a contract never existed between the parties. Moreover, the OTS challenged the district court's jurisdiction to decide Charter's claims. It argued that the Tucker Act vested exclusive jurisdiction over contract actions in the Claims Court. The OTS also argued that the claims against the FDIC were not ripe for review because the FDIC had not threatened action against Charter and Charter had no other basis on which to assert an immediate threat of injury from the FDIC.

The district court asserted jurisdiction over the OTS and the FDIC pursuant to 12 U.S.C. § 1464(d)(1)(A), which grants federal courts jurisdiction over suits against the OTS, and § 1819(a), which grants federal courts jurisdiction over suits against the FDIC. It dismissed the ripeness challenge by the FDIC, finding that Charter was under an immediate threat of being placed into receivership under the FDIC. The court then ruled that the parties had entered into contractual relationships wherein Charter agreed to take over several failing thrifts in exchange for promises by the FHLBB to permit Charter to use supervisory goodwill as a capital asset over the specified amortization periods. The court accepted OTS's interpretation of FIRREA § 301, holding that FIRREA's new capital requirements abrogated prior supervisory goodwill agreements with the FHLBB. It also accepted OTS's interpretation that § 401(g) did not save the agreements and that no other nondiscretionary saving exceptions existed in FIRREA. Because of the conflict these findings produced, the court declared that if the OTS were to enforce FIRREA's new capital requirements against Charter and not grant it a discretionary exemption under § 1464(t)(7), the 1982 and 1985 contracts would be rescinded and the acquired thrifts severed from Charter. The OTS would then have to treat the acquired thrifts as

separate entities for purposes of capital requirements. *Charter Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 773 F. Supp. 809 (W.D. Va. 1991).

The OTS and FDIC appeal the district court's judgment. They contend on appeal that the district court did not have jurisdiction to decide these claims, that the court erroneously ruled that a contract existed between Charter and the FHLBB, and that, assuming an implied contract, the court erred in declaring a remedy of rescission.

II.

We turn first to the jurisdictional issues. Appellants raise three jurisdictional challenges: (1) Charter's claims against the FDIC are not ripe for a declaratory judgment; (2) Charter's claims are reviewable only by the Claims Court under the Tucker Act; and (3) the district court did not have jurisdiction to issue a de facto injunction. Jurisdictional questions are questions of law properly reviewed *de novo*. In regard to Appellants' first challenge, we recognize that varying standards of review have been applied by Circuit Courts in reviewing district courts' exercises of jurisdiction *vel non* in declaratory judgment actions.[8] The decision whether to exercise jurisdiction in a declaratory judgment case is within the sound discretion of the district court. 28 U.S.C. § 2201 (1988). We have chosen to follow those Circuits which

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[8] *Compare Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1333 (11th Cir. 1989) (adopting *de novo* standard of review), and *Fireman's Fund Ins. Co. v. Ignacio*, 860 F.2d 353, 354 (9th Cir. 1988) (same), and *Tempco Elec. Heater Corp. v. Omega Eng'g*, 819 F.2d 746, 748 (7th Cir. 1987) (same), and *Beacon Constr. Co. v. Matco Elec. Co.*, 521 F.2d 392, 397 (2d Cir. 1975) (same), *with El Dia, Inc. v. Colon*, 963 F.2d 488, 492 (1st Cir. 1992) (using a standard in between abuse of discretion and *de novo* review), and *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 n.2 (5th Cir. 1983) (suggesting abuse of discretion standard), and *Exxon Corp. v. Federal Trade Comm'n*, 588 F.2d 895, 900 (3d Cir. 1978) (adopting "closer scrutiny" than abuse of discretion, but still deferential).

review such decisions *de novo*. *Mitcheson v. Harris*, 955 F.2d 235, 237 (4th Cir. 1992). That is, we substitute our discretion for that of the district court's in determining whether to entertain a declaratory judgment action.

A. Appellants contend that the FDIC should have been dismissed as a party to this case because it had taken no action nor threatened any action against Charter. Federal courts may issue declaratory judgments only in cases of actual controversy. 28 U.S.C. § 2201 (1988). The controversy must be "ripe" for judicial resolution, that is, in the context of an administrative case, there must be "an administrative decision [that] has been formalized and its effects felt in a concrete way by the challenging parties." *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 200 (1983) (citing *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). *Abbott* set forth the two-prong test now used by courts for determining ripeness: (1) whether the issues are fit for judicial decision and (2) whether hardship will fall to the petitioning party on withholding court consideration. 387 U.S. at 149. Although there is no precise list of factors a court should entertain in applying this test, the Court in *Abbott* listed several for consideration. A case is fit for judicial decision where the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings. *Id.* at 149. The hardship prong is measured by the immediacy of the threat and the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law. *Id.* at 153.

Applying the *Abbott* test in this case, we believe the tentative nature of the FDIC's involvement renders Charter's claims not ripe as to the FDIC. The FDIC has

two possible avenues of involvement here. First, it could be appointed by the OTS as conservator or receiver for Charter. *See* 12 U.S.C. § 1821(c) (Supp. II 1990). However, since the OTS has not yet appointed the FDIC, the only party against whom Charter's claim lies is the OTS. The FDIC has no authority to appoint itself as receiver or conservator. Second, the FDIC has authority to terminate Charter's status as an insured depository. *See* 12 U.S.C. § 1818(a)(2). Yet, before terminating Charter's status, the FDIC must first determine that Charter is "in an unsafe or unsound condition [and should not] continue operations as an insured institution." § 1818(a)(2)(A)(ii). It must then give notice for the purpose of correcting the offending practices, § 1818(a)(2)(A), and if a satisfactory change is not made, give a second notice stating its intent to terminate insurance. § 1818(a)(2)(B). Finally, the FDIC must conduct a hearing before its Board of Directors, subject to judicial review. § 1818(a)(3), (5). Thus, several contingencies separate Charter from a threat of final agency action in this case. *See* 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2757, at 586-87 (3d ed. 1983) (suggesting that cases posing a double contingency may not be appropriate for declaratory judgment). Although we realize that "final agency action" in this context does not mean that all administrative procedures must have been satisfied, *see Frozen Food Express v. United States*, 351 U.S. 40, 44-45 (1956), it does mean that a definitive decision or ruling must have been made with regard to petitioner. Here, the FDIC has not determined Charter to be in an "unsafe or unsound condition," not issued a first notice to correct operating practices, nor indicated any other action which would cause Charter to change its operating practices.

In *Pacific Gas & Elec.*, the Supreme Court declared not ripe for review a constitutional challenge to a California energy statute. In so holding, the Court reasoned that

because "determinations under § 25524.1(b) [are made] on a case by case basis," and because " 'we cannot know whether the Energy Commission will ever find a nuclear plant's storage capacity to be inadequate,' judicial consideration of this provision should await further developments." 461 U.S. at 203 (citation omitted). Like the Court in *Pacific Gas*, we find Charter's claims against the FDIC premature. We find further support for our decision in *Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332 (6th Cir.), *cert. denied*, 112 S. Ct. 370 (1991). In that case, Franklin Federal sought to enjoin the OTS and the FDIC from enforcing FIRREA's capital requirements excluding supervisory goodwill. The court held that while the suit was ripe as to the OTS, the claim as to the FDIC was not ripe because the FDIC had taken no action against Franklin Federal. *Id.* at 1338.

B. Appellants next argue that jurisdiction in this case lies exclusively in the Claims Court under the Tucker Act. They contend that the only waiver of sovereign immunity applicable to this action is in the Tucker Act, which grants jurisdiction to the Claims Court over all contract claims against the United States. *See* 28 U.S.C. § 1491(a)(1) (1988). Section 1346(a)(2) provides the one exception and grants concurrent jurisdiction to district courts over Claims Court actions where claims do not exceed $10,000. 28 U.S.C. § 1346(a)(2). Appellants contend that, "[a]lthough Charter does not place a dollar value on its claim, given the amounts of money involved, it appears that, if properly framed, it would exceed $10,000." Joint Brief for Appellants at 22.

We easily dispose of this claim because Charter seeks a declaratory judgment concerning its contractual rights and not money damages pursuant to a contract. The Tucker Act does not forbid a district court from issuing a declaratory judgment with respect to contractual rights, even if that judgment later serves as a basis for money

damages. *Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376, 1379 (9th Cir. 1981). Congress granted the district courts jurisdiction over suits brought against the OTS under FIRREA, "other than suits on claims for money damages." 12 U.S.C. § 1464(d)(1)(A).[9] Since Charter clearly seeks a declaratory judgment and not money damages, we find that its claims were properly before the district court.

C. The government characterizes the district court's declaratory judgment as a de facto injunction enjoining the OTS from enforcing its regulations.[10] As such, they assert, it would violate 12 U.S.C. § 1818(i), which prohibits district courts from issuing injunctions against the United States to enforce banking regulations. Since we reverse the district court's declaratory judgment, we dismiss this claim without deciding whether the district court order was in fact an injunction.

III.

We now consider the substantive issues in this case. Our review is limited to whether a contract existed between Charter and FHLBB (or its replacement agency, OTS); and, if so, whether the contract provided that Charter could treat supervisory goodwill as capital during the entire specified amortization period. If we find that

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[9] Section 1464(d)(1)(A) provides in part:

> [T]he Director [of OTS] shall be subject to suit (other than suits on claims for money damages) by any Federal savings association or director or officer thereof with respect to any matter under this section or any other applicable law, or regulation thereunder, in the United States district court . . . .

[10] They assert that separation of the merged financial institutions is next to impossible, thus rendering the district court's option of rescinding the 1982 and 1985 contracts and enforcing OTS regulations against the individual institutions a null choice.

such a contract exists, we must then determine whether rescission is appropriate.

We do not render an interpretation of the FIRREA provisions involved here. The district court accepted the position of OTS, which Charter appears to concede on appeal, that FIRREA's strict capital requirements abrogate any prior agreements with the FHLBB permitting long-term use of supervisory goodwill as capital. *See* Thrift Bulletin 38-2 (Jan 9, 1990) (stating OTS's interpretation of FIRREA § 301). The OTS also takes the position, which the district court accepted, that FIRREA contains no exceptions to its capital requirements for prior supervisory goodwill agreements. This interpretation has been adopted by all the Circuits ruling on the issue. As of this writing, six Circuits have decided similar cases involving supervisory goodwill. All found that the plain language of § 301, as well as the legislative history of FIRREA, justify the OTS's position that FIRREA's new requirements supersede prior supervisory goodwill agreements without exception. *See Security Sav. and Loan Ass'n v. Director, Office of Thrift Supervision*, 960 F.2d 1318, 1323 (5th Cir. 1992); *Carteret Sav. Bank v. Office of Thrift Supervision*, 963 F.2d 567, 581-82 (3d Cir. 1992); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, No. 91-5246, slip op. at 33 (D.C. Cir. June 12, 1992); *Far West Fed. Bank v. Director, Office of Thrift Supervision*, 951 F.2d 1093, 1099 (9th Cir. 1991); *Guaranty Fin. Services, Inc. v. Ryan*, 928 F.2d 994, 1003-04 (11th Cir. 1991); *Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1341 (6th Cir.), *cert. denied*, 112 S. Ct. 370 (1991). We likewise accept this interpretation. Therefore, if we determine that the FHLBB contracted with Charter to permit use of supervisory goodwill as an asset over the specified amortization periods regardless of intervening legislation, then FIRREA's new requirements would render performance of those contracts by OTS impossible.

A. We note initially that no express, written contract exists between the parties.[11] The written merger agreements were between Charter and the acquired institutions. The resolutions issued by the FHLBB in connection with the mergers merely granted that agency's approval of the merger and the accounting practices employed by Charter in connection therewith. In this regard, we find our case differs from similar supervisory goodwill cases, which have all involved written agreements between the complaining thrift and the FHLBB or FSLIC. For example, in one of the first supervisory goodwill cases decided by the appellate courts, the Eleventh Circuit assumed the existence of a contract between the plaintiff financial institution and the FHLBB where the parties had entered into a written agreement stating, " 'This Agreement shall be deemed a contract made under and governed by Federal law.' " *Guaranty Fin. Services, Inc.*, 928 F.2d at 998; *see also Security Sav. and Loan Ass'n*, 960 F.2d at 1323 (leaving issue of whether contract existed to Court of Claims—the thrift and FSLIC had executed an Assistance Agreement setting forth terms of merger); *Carteret Sav. Bank*, 963 F.2d at 574 (assuming arguendo that forbearance letter from FHLBB constituted a contract); *Transohio Sav. Bank*, slip op. at 36-38 (finding existence of contract where written Assistance Agreement existed between bank and FSLIC and the Agreement incorporated FHLBB resolution); *Far West Fed. Bank*, 951 F.2d at 1100 (leaving issue of contractual rights to Court of Claims—FHLBB issued forbearance letter and bank and FHLBB entered into written "conversion agreement"). Unlike these cases,

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[11] The FHLBB expressly agreed in connection with the New Federal acquisition to forbear for a period of five years (until 1990) from enforcing net worth requirements which Charter might fail to meet due to its acquisition of New Federal. *See* Letter from FHLBB to Charter (April 2, 1985) (copy in J.A. at 127). While this may constitute an express agreement, its terms have expired and it is now moot for purposes of this case.

however, we find no evidence of an express contract in *the merger documents in this case.*[12]

Since our case involves no written expressions of intent to contract nor any written contracts between the parties, we are reluctant to rule that a contract exists. However, we need not decide the contract issue because we find, in any event, that the FHLBB did not promise to exempt Charter from future capital regulations. We can assume, then, without deciding, the existence of an implied contract between the FHLBB (or OTS) and Charter and resolve the case on the issue of contract interpretation.

B. Charter contends that the FHLBB promised Charter permission to use supervisory goodwill as capital for regulatory purposes over the entire specified amortization periods, regardless of intervening regulations. Charter argues that it would never have agreed to take on the failing thrifts without such an assurance.

Where the federal government is a party to a contract, courts should apply an additional, special rule of contract construction. As stated by the Supreme Court:

> While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, see *Perry v. United States*, 294 U.S. 330, 350-354 (1935); *Lynch v. United States*, 292 U.S. 571 (1934), we have declined in the context of commercial contracts to find that a "sovereign forever waives

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[12] We also distinguish on these facts our case from two recent supervisory goodwill cases decided by the Claims Court. Unlike the Circuit Courts, the Claims Court has directly ruled on the issue of whether contracts exist in supervisory goodwill cases. *See Statesman Sav. Holding Corp. v. United States*, Nos. 90-773C and 90-772C (Cl. Ct. July 24, 1992) (finding written Assistance Agreements between thrifts and FSLIC constituted contract); *Winstar Corp. v. United States*, 21 Cl. Ct. 112, 116-17 (1990) (*Winstar I*) (finding forebearance [sic] letter and other circumstances of transaction supported existence of a contract).

> the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). Rather, we have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Ibid.* Therefore, contractual arrangements, including those to which a sovereign itself is party, "remain subject to subsequent legislation" by the sovereign. *Id.*, at 147.

Bowen v. Public Agencies Opposed to Social Sec. Entrapment, 477 U.S. 41, 52 (1986). In *Bowen*, the Court held that a termination clause in a contract between the Secretary of Health and Human Services and the State of California was superseded when Congress amended the Social Security Act to prohibit states from terminating such contracts. The Court reasoned that since the agreement by its express terms was entered into "in conformity with" the Social Security Act, without expressly protecting California from future legislation, Congress had reserved not only the right to amend the Act, but also the right to amend the individual contracts under the Act. *Id.* at 53. Furthermore, the Court was reluctant to "surrender a sovereign power . . . that serves to implement a comprehensive social welfare program affecting millions of individuals throughout our Nation." *Id.* at 53.

In the context of supervisory goodwill cases, the D.C. and Eleventh Circuits, relying on *Bowen*, have "interpret[ed] the contract provisions at issue to mean that the agencies would allow [the thrift] to treat supervisory goodwill as regulatory capital only as long as the regulatory regime permitted the agencies to do so." *Transohio*, slip. op. at 43; *accord Guaranty*, 928 F.2d at 1001. In each case, the court reasoned that since the thrift had not secured in "unmistakable" terms an irrevocable prom-

ise to treat supervisory goodwill as capital, the court would not infer such a provision. *Transohio*, slip op. at 42-43; *Guaranty*, 928 F.2d at 1001. We follow these cases and hold that the FHLBB did not promise Charter continued use of supervisory goodwill as regulatory capital in the face of a contrary regulatory scheme.

In our case, like *Transohio* and *Guaranty*, the FHLBB never expressly waived its right to enforce future regulations governing supervisory goodwill. The FHLBB approved Charter's use of supervisory goodwill under its then statutory discretion to permit such accounting practices, but made no explicit promise to Charter of continued approval throughout the life of the amortization period. In other words, the FHLBB assured Charter that its use of supervisory goodwill was permissible under the then current law and that the FHLBB would approve such practices under such law. Without a more explicit promise, we will not enlarge the scope of guarantees given to Charter.

Furthermore, the highly regulated nature of the savings and loan industry convinces us that, absent an explicit statement to the contrary, the FHLBB would not have intended to promise Charter continued treatment of supervisory goodwill as capital for the life of the amortization period. The savings and loan industry has been closely regulated by the government since the early 1930's with the creation of the FHLBB and the FSLIC. Regulations govern "'"the powers and operations of every Federal savings and loan association from its cradle to its corporate grave."'" *Transohio*, slip op. at 5 (citing *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 145 (1982) (citation omitted)). Capital requirements have been an evolving part of the regulatory scheme since its inception. *Id.* Given this environment, the FHLBB would have expected changes in statutory requirements, including capital requirements. We find it doubtful, then, that the FHLBB intended to se-

cure to Charter the use of supervisory goodwill over a fifteen to twenty-five year period.

Charter contends that it is absurd to believe a healthy thrift would merge with a troubled one without assurances that the surviving institution could treat supervisory goodwill as regulatory capital over the lifetime of the amortization period. However, we presume that Charter could have accounted for the risk of regulatory change in making its decisions to acquire failing thrifts. At the time of its first acquisition, Charter operated as a savings and loan. It certainly was cognizant of the regulatory intrusions into this business. If Charter wanted to avoid the risk of regulatory change, it could have demanded more explicit assurances. " 'Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.' " *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986) (citing *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

C. Given our holding, we need not rule on the appropriateness of rescission as a remedy.

IV.

In summary, we find that this case does not present any ripe controversy as to the FDIC, and we dismiss that party as a defendant. The district court did have jurisdiction over this case as to the OTS pursuant to § 301(d)(1)(A) of FIRREA. In considering the merits of Charter's case, we find that the FHLBB did not contract to exempt Charter from FIRREA's capital regulatory requirements. Rather, it agreed only to permit such use of supervisory goodwill as was lawful under the regulations. Accordingly, we reverse the district court's declaratory judgment ordering recision [sic] as a remedy for enforcement by OTS of FIRREA's new regulatory requirements.

AFFIRMED IN PART AND REVERSED IN PART

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-2647
CA-91-12-A

CHARTER FEDERAL SAVINGS BANK,
Plaintiff-Appellee,

v.

OFFICE OF THRIFT SUPERVISION, Director, in his own official capacity and as successor in interest of Federal Home Loan Bank Board; FEDERAL DEPOSIT INSURANCE CORPORATION, in its own capacity and as successor in interest to Federal Savings and Loan Insurance Corporation,

Defendants-Appellants.

No. 91-2708
CA-91-12-A

CHARTER FEDERAL SAVINGS BANK,
Plaintiff-Appellee,

v.

OFFICE OF THRIFT SUPERVISION, Director, in his own official capacity and as successor in interest of Federal Home Loan Bank Board; FEDERAL DEPOSIT INSURANCE CORPORATION, in its own capacity and as successor in interest to Federal Savings and Loan Insurance Corporation,

Defendants-Appellants.

On Petition for Rehearing with Suggestion
for Rehearing In Banc

Filed October 27, 1992

The appellee filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Russell, with the concurrence of Judge Butzner and Judge Simons, Senior United States District Judge for the District of South Carolina, sitting by designation.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

Civil Action No. 91-0012-A

CHARTER FEDERAL SAVINGS BANK,
110 Piedmont Avenue
P.O. Box 668
Bristol, Virginia 24203,
Plaintiff,

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION,
in his own official capacity and as successor in interest to
FEDERAL HOME LOAN BANK BOARD,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,
in his own official capacity and as successor in interest to
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
Defendants.

MEMORANDUM OPINION

[Filed August 16, 1991]

BACKGROUND

The history that led to this litigation began with the savings and loan crisis in the late 1970s and early 1980s. The government agencies charged with dealing with the

crisis were the predecessors to the defendants in the present case. The Federal Home Loan [Bank] Board (FHLBB) was charged with regulating the thrift industry, a function that is now performed by a defendant in this suit—The Office of Thrift Supervision (OTS). One of the responsibilities of the FHLBB was to keep the industry solvent, which it attempted to do by establishing and enforcing minimum capital standards. The government had a special interest in keeping the industry solvent because it insured most of the deposits in the nation's thrifts. Insuring these accounts was one of the responsibilities of the Federal Savings and Loan Insurance Corporation (FSLIC), which operated under the authority of the FHLBB and was succeeded by the other defendant in this suit—The Federal Deposit Insurance Corporation (FDIC).

Another responsibility of the FSLIC was to assist troubled thrifts, a job that became more difficult as the savings and loan crisis emerged. The authority of the FSLIC to help these thrifts came from regulations and resolutions passed by the FHLBB. The measures taken by the FSLIC would vary according to the context. Some thrifts might be so insolvent that they would have to be put into receivership and liquidated, and the funds of the FSLIC would be used to pay off the insured deposits. Other troubled thrifts were healthy enough to avoid the necessity of liquidation. In these cases, the FSLIC would play a key role in the transactions by searching for healthier thrifts as prospective acquirers. The FSLIC had an obvious interest in finding them since its insurance fund was ultimately at stake in the event that its search failed. When the FSLIC found a prospective acquirer, it might still be required to expend its funds by offering cash assistance for the merger in order for the new thrift to meet the FHLBB's capital standards. The present litigation arose from plaintiff's acquisition of several troubled thrifts under the supervision of the FSLIC as described above.

One way for a healthy thrift to acquire a troubled thrift under the supervision of the FSLIC and take on its liabilities without violating the FHLBB's capital standards was to employ an accounting device called "supervisory goodwill." This accounting device was included in a collection of accounting standards and principles known as "generally accepted accounting principles" (GAAP). The amount of the acquired thrift's liabilities that exceeded the amount of its assets was labeled "supervisory goodwill" and treated as an asset to be amortized. By employing this accounting device, the parties could turn liabilities into an intangible asset called supervisory goodwill and thereby satisfy the FHLBB's capital standards.

The source of authority permitting the use of supervisory goodwill were the resolutions and regulations of the FHLBB. In 1974, the FHLBB issued Memorandum R-31a which permitted the use of goodwill arising from an acquisition if it was amortized within 10 years. In 1981, the FHLBB issued Memorandum R-31b which extended the maximum permissible amortization period to 40 years. According to Carl O. Kamp Jr., President of the Federal Home Loan [Bank] of Atlanta between 1973 and 1988, the FHLBB realized by the late 1970s and early 1980s that the FSLIC did not have enough funds to liquidate the increasing number of troubled thrifts or offer cash assisted mergers. It therefore resorted to inviting healthy thrifts to merge with troubled thrifts and telling the prospective acquirers that capital standards could be met by using supervisory goodwill under GAAP. Affidavit of Carl O. Kamp, Jr. at 1, 2. See also the affidavit of John Walker at 2.[1] Certain employees of the Federal Home Loan Bank of Atlanta acted as agents of

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[1] Walker was on the board of directors of a troubled thrift that plaintiff acquired. A supervisory agent from the FHLBB "informed the Board that the regulatory authorities had recently approved certain accounting procedures to encourage healthy thrifts to seek mergers with insolvent ones, subject to consent of the Federal Home Loan Bank Board . . . ."

the FHLBB and asked plaintiff to consider several mergers with troubled thrifts during the 1980s. Affidavit of Carl O. Kamp, Jr. at 2.

Although the FHLBB provided for the use of supervisory goodwill through GAAP, it would only give its approval on a case by case basis. Parties who wished to execute a merger had to request permission from the FHLBB to use supervisory goodwill. Typically, a supervisory agent brought two thrifts together, they would execute an agreement to merge, and they would apply to the FHLBB for permission to consummate the merger. If the FHLBB approved of the merger, it would issue a resolution stating so under certain conditions. One of these conditions would be that the parties have their accountants prepare a proposal acceptable to the supervisory agent which certified that any goodwill resulting from the merger was in accordance with FHLBB regulations. The proposal also had to state the period over which the supervisory goodwill would be amortized. Neither the FHLBB nor the supervisory agents were required to approve of a merger, even if its proposed accounting treatment complied with the FHLBB regulations which required the use of GAAP. Consequently, FHLBB approval of the use of supervisory goodwill was more an exercise of genuine choice than a course of action mandated by its own regulations.

The FHLBB, upon consummating such a merger, explicity stated in the resolutions giving its approval that it was receiving a benefit. For example, Resolution No. 85-223, in which the FHLBB approved of plaintiff's acquisition of New Federal Savings and Loan of Knoxville, recognized that "[s]evere financial conditions exist which threaten the stability of a significant number of institutions the accounts of which [were] insured by the FSLIC" and that the "[t]he [m]erger would lessen the risk to the FSLIC." The resolution also recognized "[t]hat the [Bank] Board, as operating head of the FSLIC, in mak-

ing its determination under [the] Resolution has consideration to the need to minimize the cost of financial assistance . . . ." Plaintiff's Exhibit 14.

In 1981, supervisory agents of the FHLBB canvassed many thrifts in Virginia to see if they were interested in acquiring First Federal Savings and Loan Association of New River and Peoples Federal Savings and Loan Association of Roanoke in an unassisted merger. The FHLBB felt a merger was necessary because the thrifts' operating losses were accumulating so rapidly that they would become insolvent within several months and perhaps be liquidated. Besides its concern about funding a liquidation, the FHLBB was also concerned about the impact a liquidation would have on the public's impression of the thrift industry. Plaintiff's proposal for the merger was chosen by the FHLBB because it agreed to merge without financial assistance. Defendants' Response to Plaintiff's First Set of Interrogatories at 3, 6.

Plaintiff stipulated that it would not merge with the insolvent thrifts if it could not account for supervisory goodwill as an asset. This condition, however, was obvious since the combined negative net worth of the two institutions was over $40 million and would have subjected plaintiff to sanctions for violating the capital standards of the FHLBB had it been accounted for as a liability. The supervisory agents assured plaintiff that the existing regulations permitted supervisory goodwill, and that the FHLBB would approve of an accounting proposal that used principles in accordance with GAAP and FHLBB regulations.

The FHLBB formally approved of the merger when it issued Resolution No. 84-42 on January 22, 1982. The resolution stipulated that plaintiff's accountants had to submit a proposal which "substantiate[d] the reasonableness of amounts attributed to intangible assets, including goodwill, and . . . the related amortization periods and methods . . . ." Plaintiff's Exhibit 8. On May 24, 1982,

plaintiff's accountant submitted a proposal which was later approved, and which provided for the supervisory goodwill resulting from the merger to be amortized over a period of 40 years. The proposal cited standards and principles from the FHLBB to support the accounting and concluded that "the period and method of amortization of goodwill . . . are within the bounds established" by standards issued by the Board in its various publications. Plaintiff's Exhibit 11.

Sometime in 1985, a representative of the Home Loan [Bank] of Cincinnati asked plaintiff if it was interested in bidding for the acquisition of New Federal Savings and Loan Association of Knoxville, Tennessee. New Federal had been formed by the FSLIC on November 16, 1984 and comprised five failed savings and loan associations in which the FSLIC had taken over. Plaintiff was chosen as the merger partner with New Federal because it offered the largest premium of all bidders. In addition, "the FSLIC did note that Charter was a more viable institution with less supervisory concern than the institution bidding the next highest premium." Defendant's Answer 17 to Plaintiff's First Set Interrogatories. Had the FSLIC liquidated New Federal, it would have required a cash transfer of $196 million. Plaintiff's bid, however, required the FSLIC to transfer only $181 million. Plaintiff told the supervisory agent from the Cincinnati office that the bid was made under the condition that $15 million would be treated by the FHLBB as supervisory goodwill to be amortized over a period which the parties would stipulate later. Affidavit of E. L. Byington, Jr. at 5.

On March 29, 1985, representatives from the FSLIC made a merger agreement with plaintiff. The agreement required both parties to "execute and deliver all instruments, certificates, and other documents as may be necessary or incidental to the performance of [the] Agreement. Plaintiff's Exhibit 12 at 4. The FHLBB approved of the merger in Resolution No. 85-223 which it issued on March 29, 1985. Like the resolution approving the previous

merger, 85-223 stipulated that plaintiff's accountants would have to submit an accounting proposal which explained the amount of goodwill generated by the merger and the period of amortization. Plaintiff's Exhibit 14 at 7. The accountants submitted a proposal which would amortize $15 million in goodwill over 35 years, and it was accepted by representatives of the Home Loan [Bank] in Atlanta. The proposal cited principles and standards established by the Board to justify the accounting. Shortly after merging with New Federal, plaintiff merged with Magnolia Federal Savings and Loan Association under circumstances resembling the other two mergers. The Magnolia merger generated only $24 thousand in goodwill.

Defendants and plaintiff disagree over how to characterize the legal relationships between plaintiff and the FHLBB when the mergers were transacted. Plaintiff wants the court to imply a contract between it and the government. The government needed plaintiff to acquire the accounts of the troubled thrifts in order to avoid the costly alternative of liquidating them. Plaintiff was under no obligation to acquire them, so the government had to offer an inducement, namely a promise to allow plaintiff to use an accounting device that labeled the acquired liabilities as assets and amortize them over a period and under a method both parties agreed upon. According to plaintiff's characterization, the government needed plaintiff's services and made an offer based on a promise in order to induce plaintiff's assent to provide the services. The service of relieving the government from dealing with the troubled thrifts was the government's consideration. Plaintiff's consideration was the ability to expand its operations by converting the troubled thrifts into one of its branches. The government was not forced to allow plaintiff to merge with the troubled thrifts. It was a party to the transaction because it desired the merger and chose to induce plaintiff to act in a certain way that was a necessary prerequisite to perform the merger.

Defendants deny that the government was a party to a contract. The only contracts in the mergers were between plaintiff and the thrifts it acquired. After the parties made the agreements they asked for permission from the agency charged with regulating the industry if they could consummate the transaction. This step was a requirement that all thrifts had to follow when they transacted a merger. The FHLBB saw nothing in the transactions that violated its regulations and therefore gave its consent. The FHLBB was merely following its own regulations as they existed at the time. It was not promising to give plaintiff a contractual right to be treated as those regulations prescribed. This difference over how to characterize the legal relationship between the FHLBB and plaintiff is the most important question that underlies the merits of the parties' claims.

Congress dramatically altered the regime which regulated the thrift industry when it passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). The new law created the defendants in this case—OTS and FDIC—which replaced the FHLBB and FSLIC respectively. FIRREA established new capital standards for the thrift industry and abrogated the use of supervisory goodwill.

OTS's new regulations prescribed a variety of sanctions for noncompliance with the new standards, and FIRREA gave OTS broad authority to place a thrift in conservatorship or receivership if it operated in an "unsafe or unsound" condition. The regulations required noncomplying thrifts to submit a capital plan to OTS which explained measures the thrift would take to achieve compliance with the standards by the end of 1994. OTS announced in Thrift Bulletin 36a that any capital plan would be unacceptable if it did not anticipate full regulatory compliance by December 31, 1994.

On March 26, 1990, OTS notified plaintiff that it was insolvent. In a letter dated January 17, 1991, OTS

rejected plaintiff's capital plan and would not permit it to make any new loans or investments, but it offered to take less restrictive measures if plaintiff would sign an enclosed "consent agreement." Plaintiff's exhibits 2, 3. Among the agreement's many provisions were plaintiff's consent to the appointment of a conservator or receiver, an agreement by the board of directors of plaintiff to resign at the request of OTS, and an agreement not to sue any thrift which OTS might place into conservatorship or receivership.

After receiving the letter plaintiff received several calls from thrifts that said they were referred by OTS in order to "assist" plaintiff. Plaintiff suggests that the word "assist" refers to a program conducted by the Resolution Trust Corporation called the Accelerated Resolution Program (ARP) in which "the assisted institution [is] put into receivership immediately prior to the sale of the institution." 55 Fed. Reg. 37380-01 (1990).

Defendants argue that there was never a contract between plaintiff and the government to account for supervisory goodwill as an asset. Because FIRREA has abrogated supervisory goodwill, all liabilities that were previously recorded as assets by plaintiff must now be recorded as liabilities. If plaintiffs cannot meet these new standards they are subject to the sanctions the law prescribes for violating them. Plaintiff has no contractual entitlement to operate under the regulations of the old regime. Even if there was a contract, this court has no jurisdiction to hear plaintiff's claim because only the Claims Court has jurisdiction to hear the contract claim. In addition, defendants have not taken sufficient actions to make plaintiff's claim ripe for review. In particular, the FDIC argues that it has not communicated to plaintiff or made a formal decision concerning its status.

Plaintiff argues it made a contract with the FHLBB for the use of supervisory goodwill, and the contract was

abrogated by FIRREA. Plaintiff seeks rescission of the contract because FIRREA was a supervening law that made performance impossible. The court should place the parties in the status quo ante by giving the troubled thrifts back to the government, which would relieve plaintiff of having to account for their liabilities. Plaintiff notes that the government's position would improve under this remedy because plaintiff has already amortized some of the liabilities.

In the alternative, plaintiff asks the Court to characterize the abrogation of its contractual entitlement as a takings and enjoin the government from applying sanctions since it is not going to adequately compensate plaintiff. Defendants assert that only the Claims Court has jurisdiction over a takings claim, and that the issue is not ripe for review.

Plaintiff pleads another alternative form of relief that contradicts its first claim. According to this theory, a savings provision in FIRREA as preserves [sic] all contracts made by the FHLBB. Since there was a contract between plaintiff and the FHLBB for treating supervisory goodwill as an asset, the statute preserves this contractual entitlement. The court should enjoin defendants from applying sanctions that they would not otherwise apply had supervisory goodwill been treated as an asset. Defendants contend the savings provision does not preserve a contract transacted by the FHLBB if its terms conflict with provisions in the statute. Since plaintiff's purported contract violates the capital standards prescribed by the statute, Congress did not intend to preserve it.

The plaintiff's last alternative argument is that OTS violated the Administrative Procedure Act (APA) because it did not give opportunity for notice and comment when it promulgated Thrift Bulletin 36a, which disallows capital plans that do not meet full regulatory compliance by December 31, 1994. Defendants response is that the

regulation in question was not subject to these provisions of the APA.

This court is essentially granting plaintiff's first claim for relief by making a declaratory judgment that the parties entered into a contract which allowed plaintiff to use supervisory goodwill and amortize it within the respective periods of 35 and 40 years. Because defendants have not yet enforced sanctions against plaintiff, a declaratory judgment is more appropriate than requiring defendants to take possession of the assets and liabilities, since it is still unclear whether they will take action that will make performance of the contract impossible. As this opinion will explain later, the decision of whether FIRREA abrogated the contracts should be left to the defendants. The question of whether there was an implied contract between the FHLBB and plaintiff should be answered by this court.

I. THE DISTRICT COURT'S JURISDICTION OVER THE CONTRACT CLAIM

This court's jurisdiction over the claims against both defendants is granted by 12 U.S.C.A. §§ 1819 (a) Fourth and 1464(d)(1)(A) (West Supp. 1991). Section 1464 (d)(1)(A) states that the director of the Office of Thrift Supervision "shall be subject to suit (other than suits on claims for money damages) . . . in the United States district court for the judicial district in which the savings association's home office is located . . . ." Section 1819(a) Fourth states that the Federal Deposit Insurance Corporation has the power "[t]o sue and be sued and complain and defend, in any court of law or equity, State or Federal."

Defendants argue that despite these provisions, Congress has not waived sovereign immunity in district court for plaintiff's rescission claim because it is based on a contract, seeks relief which must come from the Treasury, involves injunctions against public officials, and is really a

claim against the United States even though agencies are the named defendants. *Accord*, *Portsmouth Redevelopment & Housing Authority v. Pierce*, 706 F.2d 471, 473 (4th Cir. 1983), *cert. denied* 464 U.S. 960 (1983) ("[T]he Tucker Act establishes three conditions which, if satisfied, vest subject matter jurisdiction exclusively in the Claims Court. The action must be against the United States, seek monetary relief in excess of $10,000, and be founded upon the Constitution, federal statute, executive regulation, or government contract."). The *Portmouth Redevelopment* court also ruled that "an action against a federal agency or official will be treated as an action against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act.'" *Id.*, quoting *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.E.d.2d 15 (1963). In *Portsmouth Redevelopment*, the money used to satisfy the plaintiff's claim would have come from an agency's appropriations and not the U.S. Treasury, however, the Fourth Circuit Court still considered it part of the "public treasury" and therefore ruled that the claim was against the United States.

Although plaintiffs have sought an injunction which would "restrain the Government from acting," this court has found it premature to issue it. This court is only issuing a declaratory judgment that the proposals submitted by plaintiff for the 1982 and 1985 mergers constituted terms of an implied contract. Any government enforcement action that makes performance impossible will rescind the contract and, as a result, will sever the merged institutions. These merged institutions will become separate entities for the purposes of such enforcement action. This judgment is not restraining the government from acting or compelling it to act or expending the public funds. It merely states the legal effect of actions

it may take. It is therefore questionable whether this case constitutes an "action against the sovereign."

Even if this case is considered an "action against the sovereign," the Court of Claims does not have exclusive jurisdiction because nothing in plaintiff's claim involves monetary relief. Plaintiff seeks an order which would place the institutions subject to the proposals of the 1982 and 1985 merger agreements in the possession of the government. This court's judgment modifies this request by declaring there is a contract which will be rescinded if the government takes actions that make performance impossible. Defendants have noted that transferring the institutions to the government would entail a transfer of money to the government, and they vaguely suggest that the possibility of such an "exchange" places this case within the jurisdiction of the Claims Court. Defendants, however, offer no authority for this proposition, and this court sees no logical connection between it and the requirement in *Portsmouth Redevelopment* that plaintiff's claim involve monetary relief. Plaintiff's claim is purely equitable in nature and is therefore outside the jurisdiction of the Claims Court, because the Tucker Act does not give it jurisdiction to grant injunctive or declaratory relief. *Lee v. Thornton*, 420 U.S. 139 (1975). If this court has no jurisdiction to hear the claim, then no court does. There is no reason to believe Congress intended such a result when it created district court jurisdiction in §§ 1819 and 1464.

Defendants cite *Dugan v. Rank*, 372 U.S. 609, 620 (1962) for the proposition that, in spite of the waivers of sovereign immunity in §§ 1819 and 1464 of the agencies' enabling legislation, a suit against the agencies requesting injunctive relief is really a suit against the United States because it interferes with public administration and restrains the government from acting. Because the plaintiffs in *Dugan* were suing the United States, the Court restricted their remedies to money dam-

ages provided under the Tucker Act. Defendants' interpretation of *Dugan* implies that a waiver of sovereign immunity in an agency's enabling legislation never covers suits to enjoin the agency from acting. If a plaintiff seeks relief, he or she must wait for the agency to act and then go to Claims Court for money damages.

A closer reading of *Dugan* reveals that the Supreme Court did not intend such a sweeping ruling. The Court was not presented with a general waiver of sovereign immunity that allowed an agency to be sued. The Court addressed a specific waiver of sovereign immunity that allowed the United States to be sued in a controversy over rights to use water. The Court did not conclude that the waiver of sovereign immunity only allowed suits under the Tucker Act. Rather, the Court concluded that plaintiff's claim was not covered by the waiver of sovereign immunity and therefore could only be heard under the Tucker Act. The Court interpreted the waiver of sovereign immunity as allowing only "*general* adjudication of 'all of the rights of various owners on a given stream' " rather than "a private suit to determine water rights solely between the respondents and the United States and the local Reclamation Bureau officials." *Dugan*, 372 U.S. at 618. The waivers of sovereign immunity in §§ 1819 and 1464 are much broader. Defendants do not offer an interpretation of these waivers that shows Congress did not intend plaintiff's claim to be covered by them. *Dugan* is not applicable in cases where there is a general waiver of sovereign immunity in the enabling legislation that creates an agency.

Not all contract claims against the government are in the exclusive jurisdiction of the Claims Court. "The Tucker Act does not impliedly forbid the issuance of a declaratory judgment stating that [a plaintiff] possesses contract rights against the United States." *Laguna Hermosa Corporation v. B.E. Martin*, 643 F.2d 1376, 1379 (9th Cir. 1981). The Tucker Act grants the district

court jurisdiction over contract claims for amounts under $10,000. 28 U.S.C.A. § 1346(a)(2) (West Supp. 1991). Defendants speculate that plaintiff in the future may return to this court and request monetary relief that exceeds $10,000 if this court grants its claim for rescission. There is no reason to believe plaintiff will bring such a suit, and even if it did, defendants are free to argue that this court has no jurisdiction to award more than $10,000 if and when the government decides to abrogate the contract.

Even if plaintiff's claim had involved monetary relief, this would not be dispositive because the Fourth Circuit does not place all such claims outside district court jurisdiction. In *Ulmet v. United States*, 888 F.2d 1028 (4th Cir. 1989), the court noted that its precedents concerning district court jurisdiction over claims for monetary relief had been altered by the Supreme Court in *Bowen v. Massachusetts*, 487 U.S. 879 (1987). *Ulmet*, 888 F.2d at 1030. The Supreme Court drew a distinction between monetary relief, which is incidental to "equitable action for specific relief" and "an action at law for damages. . . ." *Bowen v. Massachusetts*, 487 U.S. at 893. Only actions for money damages are in the exclusive jurisdiction of the Claims Court. Equitable relief includes "the recovery of specific property or monies . . . ." *Id.*, quoting *Larson v. Domestic & Foreign Commerce Corp.*, 887 U.S. 682, 688 (1949). "The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen v. Massachusetts*, 487 U.S. at 893. Plaintiff's claim is clearly equitable in nature and not a claim for money damages in disguise. This court recognizes that *Bowen* did not apply to a claim against the government based on contract, and the Fourth Circuit has not addressed the issue of whether *Bowen* allows monetary relief over $10,000 from the government based on a contract claim. As stated earlier, it is only proper to settle this issue when it arises.

There is another reason why this court should not hesitate over the possibility of a future restitution claim. The Federal Circuit made a broad interpretation of the "sue and be sued" clause in the enabling legislation that waives sovereign immunity for the FDIC. In *Far West v. OTS*, 930 F.2d 883 (Fed. Cir. 1991), the court ruled that the "FDIC's statutory authorization to sue and be sued in a state or federal court accommodates the commercial and business context in which this agency operates." *Id.*, at 888. The court ruled that the waiver of sovereign immunity covered a contract claim seeking monetary relief. The Supreme Court has described the the special circumstance surrounding a "sue and be sued" clause in the enabling legislation of a government corporation

> Such waivers by Congress of governmental immunity . . . should be liberally construed . . . . Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it . . . must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances.

Loeffler v. Frank, 486 U.S. 549, 554-55 (1987), quoting *FHA v. Burr*, 309 U.S. 242, 245 (1940).

As the Federal Circuit noted, the Fourth Circuit interpreted the "sue and be sued clause" as waiving sovereign immunity from suits against the Postal Service for post-judgment interest in *White v. Bloomberg*, 501 F.2d 1379, 1386 (4th Cir. 1974). When there is "no qualification upon the . . . amenability to process stated in the [enabling] statute, . . . the phrase 'sue and be sued' . . . is to be given its normal connotation and construction as a waiver of constitutional immunity, embracing all civil legal procedures." *Gen. Elec. Credit Corp. v. Smith*, 656 F.2d 291 (4th Cir. 1977).

The enabling language of § 1819(a) Fourth states that the FDIC has the power "[t]o sue and be sued and complain and defend, in any court of law or equity, State or Federal." The language "in any court of law or equity, State or Federal" is a critical phrase indicating that Congress did not intend to restrict federal jurisdiction to the Claims Court since "Congress could not have intended for suits over $10,000 to be brought in 'any state court of general jurisdiction, but in the federal jurisdiction only in the Court of Claims.'" *Fletcher v. Washington and Lee University*, 706 F.2d 475 (4th Cir. 1983) quoting *Ferguson v. Union Nat'l Thrift* 126 F.2d 753, 756 (4th Cir. 1942).

According to *White*, a limitation to a "sue and be sued" clause will be implied only where it is

> clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense.

White v. Bloomberg, 501 F.2d at 1386, quoting *FHA v. Burr*, 309 U.S. at 245. Defendants have not shown that allowing a suit for rescission will seriously interfere with the FDIC's authority to carry out the policies of FIRREA. If the government decides to place plaintiff in receivership, it might have a plausible claim against the FDIC for rescission damages under the authority of *White v. Bloomberg*. Although this court is certainly not implying that plaintiff would have a good chance of winning such suit, it will certainly not deny jurisdiction simply because plaintiff may have grounds for bringing such a claim in the future.

The plain language of §§ 1819 and 1464 grants this court jurisdiction to make a declaratory judgment on plaintiff's rescission claim, and defendants have shown no legal authority that suggests it belongs exclusively in the jurisdiction of the Claims Court.

II. RIPENESS

This court is not reviewing a legal challenge to the way OTS has interpreted FIRREA through its regulations, or how OTS has applied its regulations. Rather, it is reviewing whether there was an implied contract between the FHLBB and plaintiff and whether rescission is an appropriate remedy in the event that OTS enforces FIRREA in a way that makes performance impossible.

Defendants cite *O'Shea v. Littleton*, 414 U.S. 488 (1974), to support their argument that this court lacks jurisdiction over plaintiff's claim against FDIC. In *O'Shea* the Court ruled that in order to bring a claim against the government in an Article III court, a plaintiff must have sustained or be in immediate " 'danger of sustaining some direct injury' as the result of the challenged statute or official conduct." *Id.*, quoting *Massachusetts v Mellon*, 262 U.S. 447, 488 (1923). Defendants argue that since FDIC has not threatened to take action against plaintiff, there can be no immediate threat of injury. Even though FDIC has already stated that it believes plaintiff is capital deficient, defendants argue this does not present an immediate threat of injury from the FDIC because it only has "back-up" authority to take action against plaintiff if OTS fails to do so.

FIRREA provides broad authority to appoint the FDIC as a conservator or receiver. Section 212(c) of FIRREA allows the FDIC to be appointed conservator or receiver by OTS without qualification. Under § 212(c)(2)(A)(ii) only the FDIC can be appointed as receiver "whenever a receiver is appointed for the purpose of liquidation or winding up the affairs . . ." of a seized

thrift. Section 301(5)(d) gives OTS authority to appoint a receiver to a thrift if it operates under an "unsafe or unsound" condition. Section 301(5)(t)(6)(e) defines "unsafe or unsound" condition as failing to comply with "any plan, regulation, or order under this paragraph" which is entitled "Consequences of failing to comply with capital standards."

OTS formally declared that plaintiff was insolvent because it failed to meet the capital standards set by its regulations. It issued a long list of restrictions over plaintiff's operations which it offered to loosen if plaintiff agrees not to challenge the appointment of a conservator or receiver. Plaintiff had been contacted by thrifts that were referred by OTS in order to "assist" plaintiff, a term that most likely refers to a program conducted by the Resolution Trust Corporation (RTC) called the Accelerated Resolution Program (ARP). Under ARP, "the assisted institution [is] put into receivership immediately prior to the sale of the institution." 55 Fed. Reg. 37380-01 (1990). Pursuant to § 501(b)(1)(C), the RTC operates under the management of the FDIC. The court believes these circumstances indicate that plaintiff is under an immediate threat of being placed into a receivership conducted under the authority of the FDIC, therefore it is not premature to join the FDIC in this suit.

Defendants urge this court to adopt the ruling by the Sixth Circuit in *First Federal Sav. v. Ryan*, 927 F.2d 1345 (6th Cir. 1991), in which the court held that the claimants' challenge to the appointment of a conservator or receiver was not ripe for review because one had not yet been appointed. This court's decision is not currently addressing an injunction against appointing a receiver or conservator. It is addressing whether OTS must treat the thrifts plaintiff acquired in 1982 and 1985 as separate entities for purposes of enforcing sanctions that impose a significant burden against plaintiff for violations of

OTS regulations which would not have taken place but for the supervisory acquisitions, and which would not have taken place under the pre-FIRREA regime. This court, therefore, is not addressing the legality of the appointment of a conservator or receiver. For this reason, this case is closer to *Franklin Fed. Sav. Thrift v. Director, OTS*, 927 F.2d 1332 (6th Cir. 1991), the companion case of *First Federal*. In *Franklin*, the court held that an injunction against the application of Thrift Bulletin 38-2 by OTS was ripe for review. The court made a distinction between an injunction against the appointment of a conservator or receiver and an injunction against the application of a rule.

Even if *First Federal* were applicable to this case, this court disagrees with the Sixth Circuit's decision concerning preappointment challenges. The court reasoned that when two provisions of FIRREA were read together, it was clear that Congress disallowed preappointment challenges to conservators or receivers because it obviously intended that there be review only after the appointment. 12 U.S.C. § 1464(d)(2)(G) (West Supp. 1991) is an anti-injunction provision: "Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver or . . . restrain or affect the exercise of powers or functions of a conservator or receiver." 12 U.S.C.A. § 1464(d)(2)(E) (West Supp. 1991) provides that "[t]he director shall have exclusive power and jurisdiction to appoint a conservator or receiver . . . ." "[T]he association may, within 30 days thereafter, bring an action in the United States district court . . . for an order . . . to remove such conservator or receiver . . . ."

The court claimed that since the language of the statute gave the Director of OTS "exclusive power and jurisdiction to appoint a conservator or receiver," the "Congressional granting of authority to the Director [in § 1464(d)(2)(E)] . . . would be essentially meaningless

if any thrift could run to the nearest federal court and get an injunction upon the potential threat of having a conservator or receiver appointed. Congress chose to grant a particular power to an executive-branch official. Allowing this type of injunction would essentially repeal that decision." *First Federal*, 927 F.2d 1345, 1355-56. This rationale would invalidate any injunction against an official exercise of authority anytime the phrase of a statute gives "exclusive power and jurisdiction" to the official to exercise his or her authority. This court will not adopt this rule until instructed to do so by the Fourth Circuit.

The anti-injunction provision in § 1464(d)(2)(G) only refers to the "removal" of a conservator or receiver, not an attempt to block one. The plain meaning of the two provisions is that the only way to challenge the power of the receiver, once it is appointed, is to sue in district court within 30 days of its appointment. Congress was obviously conscious of when it wanted an anti-junction provision to apply, and it only made it apply after the receiver is appointed.

> Congress may have determined that once a receiver was appointed, preliminary injunctive relief would have a deleterious effect upon a savings and loan association. After appointment, immediate, unobstructed action by the receiver may be essential to conserve the savings and loan association's assets and prevent panic. Prior to appointment, injunctive relief may prevent needless liquidation of viable savings and loan associations.

First Fed. Sav. Thrift and Trust v. Ryan, 927 F.2d 1332, 1360-61 (6th Cir. 1991) (Contie, J., dissenting) (quoting *Century Fed. Sav. Thrift v. United States*, 745 F.Supp. 1363, 1367 (N.D. Ill. 1990).

Even if this court were to apply the statutory interpretation used by the court in *First Fed.*, it would not be applicable to the present case. In *First Fed.*, the court was not presented with a "consent agreement" in which

OTS agreed to ease its restrictions, which included a ban on any new investments or loans, if the plaintiff would renounce its right to oppose the appointment of a conservator or receiver. The majority concluded that because Congress only provided a right to challenge the appointment of a conservator or receiver after the appointment, it did not intend to make a remedy available before the appointment. A premise of the majority's ruling was that Congress granted the right. It is unclear whether the court would reach the same conclusion in a case where OTS has pressured a claimant to renounce its right to challenge an appointment. Under such a ruling a claimant would be forced to submit to pressure from OTS to renounce the right to challenge the appointment as long as OTS had not yet made an appointment. OTS would have an extraordinary power to pressure claimants into giving up their rights to challenge an appointment. It is quite possible that the court would view this exercise of power as defeating the intent of Congress.

III. CONTRACTUAL ISSUES

A. WHETHER THERE WAS A CONTRACT.

The facts of this case are not in dispute. The merits of this case depend on how this court characterizes the facts. The court finds a serious inconsistency in defendants' interpretation of plaintiff's relations with the FHLBB which the following quotation evokes: "There is no evidence in this case—and plaintiff cites none—suggesting that the FHLBB agreed to do anything more than enforce a regulatory mandate." Defendants' Opposition to Plaintiffs' Motion for Summary Judgment at 11. Defendants, on the one hand, state that the FHLBB "agreed to" something, but on the other hand characterizes it as a "regulatory mandate." A mandate is not something one agrees to do, since it is a command. Defendants do not want to recognize that the FHLBB had the discretion to allow or disallow the use of supervisory goodwill over the

stipulated time for amortization. The inducement to allow it came, not from the mandate of a regulation, but the FHLBB's need for assistance from plaintiff's institution. This was consideration, and it is one of the essential elements in the parties' legal relationship which characterizes it as contractual in nature. Had the FHLBB acted merely because it was following its own regulations, there would have been no consideration.

In addition to the existence of consideration, the parties made mutual promises. The approval by the FHLBB of the accounting proposals was an implicit promise, because plaintiff was justified "in understanding that a commitment ha[d] been made." Restatement (Second) of Contracts § 2 (1979). Plaintiff was justified in this understanding because it was obvious that the FHLBB intended to make a commitment, since it agreed that supervisory goodwill would be amortized over periods of 35 and 40 years. When a party wants to engage in conduct that is subject to an agency's regulatory authority, and the agency gives permission to engage in the conduct for a specified period, the party is justified in understanding that the agency is commited to allowing the conduct for the specified period. If the agency has received consideration for its permission, a contract is formed.

Defendants argue that "[t]here was no promise . . . that regulatory capital requirements were specially altered or frozen for [plaintiff]." Defendants' Opposition to Plaintiff's Motion for Summary Judgment at 11. The court recognizes that when the FHLBB made a commitment to allow supervisory goodwill to be amortized over periods of 35 and 40 years, it was not "specially altering" its regulations, since the commitment was permitted by the regulations. The court also recognizes that the FHLBB did not promise not to alter its regulations in the future. These issues, however, do not address the question of whether the FHLBB promised to allow plaintiff to use supervisory goodwill according to a specified

amortization period. They address what the remedy should be in the event that the FHLBB does not perform according to its promise.

B. WHETHER FIRREA ABROGATED THE CONTRACT AND WHAT THE REMEDY SHOULD BE.

1. WHETHER FIRREA ABROGATED THE CONTRACT.

Defendants argue "that in the enactment of [FIRREA], Congress and the President affected, and compelled OTS to affect, Charter's ability to include supervisory goodwill in capital." Defendants' Response 7 to Plaintiff's Request For Admissions. In its alternative pleading, plaintiff argues that FIRREA preserves, not abrogates, its contract for the use of supervisory goodwill. Plaintiff asserts that this court does not have to pay substantial deference to defendants' interpretation of the language in FIRREA because the Supreme Court has ruled that "a pure question of statutory construction [is] for the courts to decide." *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

The Court, however, made it clear that this is only true when

> administrative constructions . . . are contrary to clear congressional intent. . . . If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . .
>
> If this choice represents a reasonable accommodation of conflicting policies that were committed to the

> agency's care by the statute, it should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. at 445 n.29, 447-48, quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). Whether the court accepts defendants' interpretation of FIRREA does not depend on whether it prefers plaintiff's interpretation. It depends on whether defendants' interpretation is a plausible reading of the language and does not clearly conflict with congressional intent.

The parties agree that § 301(t) of FIRREA requires that the use of supervisory goodwill in calculating the "core capital" of a thrift must be phased out by December 31, 1994. Section 301(t) also requires that supervisory goodwill included in core capital must not be higher than certain percentages of a thrift's assets each year. The percentages decrease each year, starting from 1.5 percent for the period prior to January 1, 1992 and ending with .375 percent for the period between January 1, 1994 and December 31, 1994. The parties also agree that FIRREA requires thrifts that do not comply with the capital standards to submit a Capital Plan which explains the steps the thrift will take to achieve compliance. Plaintiff submitted a plan to OTS, which was rejected.

The parties' major disagreement over the interpretation of FIRREA concerns provisions of § 401. According to plaintiff, the following savings provision in § 401(g) exempts supervisory goodwill from the requirements of the new capital standards if it was created through a contract with the FHLBB: "Subsection (a) [which abolishes the FLSIC and the FHLBB] shall not affect the validity of any right, duty, or obligation of the United States, the Federal Home Loan [Bank] Board, or any

other person, which . . . existed on the day before the date of the enactment of this Act." According to plaintiff, this provision secures its contractual right to treat supervisory goodwill according to the terms stated in the accounting proposals because such treatment was a contractual obligation of the FHLBB. According to defendants, the provision only saves contractual obligations which the act of abolishing the FHLBB would otherwise have terminated. Since the use of supervisory goodwill was terminated through the enactment of § 301 (not the abolishment of the FHLBB), the savings provision of § 401(g) does not apply. This court opines that defendants' interpretation is plausible.

This court also agrees with the Eleventh Circuit's analysis of FIRREA's legislative history which concludes that Congress did not enact a provision that preserves contracts for the use of supervisory goodwill. In *Guaranty Fin. Serv., Inc. v. Timothy Ryan*, 928 F.2d 994 (11th Cir. 1991) the court analyzed attempts by members of Congress to protect supervisory goodwill. One amendment introduced by Rep. Hyde would have required an administrative hearing, subject to review by a district court, before an agency could take action against a thrift that otherwise would have complied with the new regulations but for the exclusion of supervisory goodwill from the calculation of core capital. This amendment was defeated. Rep. Quillen prepared another amendment which would have "grandfathered" supervisory goodwill accounted for in accordance with GAAP or in accordance with a written agreement with the FHLBB, but he withdrew it since the House was about to debate the Hyde amendment which addressed the same issues.

Several members of Congress believed the government was unfairly reneging on its contractual obligation to allow thrifts to amortize supervisory goodwill over the periods agreed upon by the FHLBB. These members published statements in the legislative history objecting

to what they understood to be FIRREA's abrogation of these contractual obligations. (See statements by Reps. Annunzio, Kanjorski, Flake, Hiler, Ridge, Bartlett, Dreier, McCandless, Saiki, Baker and Paxon in H.R. Rep. No. 101-54, 101st Cong., 1st Sess., pt. 1 at 496, 533 (1989), *reprinted in* 1989 U.S. Code Cong. & Admin. News 292-94, 326-27, and the statement of Rep. Hyde in H. Rep. No. 101-54, 101st Cong., 1st Sess., pt. 5 at 26-28, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 409-11.). The court reasoned that if Congress had intended that § 401(g) would preserve agreements with the FHLBB for the use of supervisory goodwill, then the strongest supporters for such a policy would not vigorously protest its absence. These representatives believed FIRREA abrogated agreements for the use of goodwill, as did their opponents who helped defeat the Hyde amendment. (See statements by Reps. Vento, Roukema, Morrison, Neal, Carper, Schumer, Lehman, Keczka, McMillen, Hoagland, Gonzalez and Pelosi in H.R. No. 101-54 101st Cong., 1st Sess., pt. 1 at 541-45, *reprinted in* 1989 U.S. Code Cong. & Admin. News at 333-36). Section 401(g) was enacted without controversy, therefore it is not plausible that it addressed a controversial issue like the treatment of supervisory goodwill.

Although Congress did not accept the Hyde amendment, it did not enact legislation which specifically abrogated contractual obligations by the government to allow supervisory goodwill. Given the legislative history, the best argument plaintiff can make is that Congress's intent regarding the government's contractual obligation to allow the use of supervisory goodwill was ambiguous when it enacted § 401(g). Since defendants have given a plausible interpretation of the language in § 401(g), *Chevron* requires that this court accept it. This court emphasizes, however, that it is only reviewing OTS's authority to make the interpretation; it is not the court's interpretation. In the future, OTS may decide to change

its interpretation or alter its regulations. Section 301 (t) (7) gives OTS authority to grant exemption from certain sanctions against thrifts that are not in compliance with the capital standards required by the Act in cases where supervisory goodwill is at issue. This court does not believe Congress' intent regarding the use of supervisory goodwill is so clear that the interpretation chosen by OTS is the only one possible.

2. WHETHER RECISION [sic] IS THE APPROPRIATE REMEDY

Contracts have "an implied condition that the promisor shall be absolved from performance if, through a supervening circumstance for which neither party is responsible, a thing, event or condition which was essential so that the performance would yield to the promisor the result which the parties intended him to receive, fails." *West Los Angeles Institute for Cancer Research v. Mayer*, 366 F.2d 220, 223 (8th Cir. 1966), quoting *Dorsey v. Oregon Motor Stages*, 183 Or. 494, 194 P.2d 967, 971 (1948). Performance may be excused when a supervening law makes it impossible. "Contractual performance can indeed be excused where the intervention of a government regulation or law makes performance impossible." *Cook v. El Paso Natural Gas Co.*, 560 F.2d 978, 982 (1977). The use of supervisory goodwill was obviously essential to the performance of the contract between plaintiff and the government. OTS has determined that using supervisory goodwill according to the terms of the contract is illegal.

If FIRREA has made performance of the contract illegal, rescission may be the appropriate remedy because the contract is no longer possible. "[I]mpossibility may be equated with an inability to perform as promised due to intervening events . . . . [D]ischarge by reason of impossibility—as well as the concomitant remedy (to the discharge) of rescission—enforces what can reasonably

be inferred to be the intent of the parties at the time of contract." *United States v. General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974). *See also* 17a Am. Jur. 2d *Contracts* (1991) ("The inability of a party to perform a contract after it is made is, as a rule, a ground for rescinding it.").

Whether the parties intended that rescission would be the remedy depends on whether they allocated the risk that a supervening event would make performance impossible. "Although . . . unexpected events that prevent a party from performing his contractual obligations frequently do excuse performance . . . , they do so only when it is reasonable to suppose that if the parties had negotiated expressly with regard to the unexpected contingency that has prevented performance they would have wanted the performing party to be excused." *Field Container Corp. v. Comm'n*, 712 F.2d 250, 257 (7th Cir. 1983). *See also* 17A Am. Jur. 2d *Contracts* § 695 (1991). ("As a general principle, nonperformance of a contract is excused where performance is rendered impossible by the law, provided the promisor is not at fault and has not assumed the risk of performing, whether impossible or not."). The issue in this case addresses how the parties contemplated the risk of the government abrogating agreements that provided for the use of supervisory goodwill.

It is obvious that plaintiff did not believe a supervening law would make it illegal to continue operating by virtue of its acquisitions, otherwise it would never have made them. However, the fact that plaintiff encountered an unexpected and unfortunate contingency which made it impossible to retain the acquisitions does not in itself relieve it of its burden to assume its obligation of keeping the liabilities of the failed thrifts. "[Y]ou can bind yourself to perform acts over which you have no control. 'In the case of a binding promise that it shall rain tomorrow, the immediate legal effect of what the promisor

does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee.'" *Field Container Corp.*, 712 F.2d at 257, quoting O.W. Holmes, The Common Law 300 (1881).

Defendants argue the risk was allocated to plaintiff because it gambled on the agency retaining the authority to accept the capital standards submitted in the proposals. Without evidence to support this assertion, the court does not believe it. It implies that a promisee bears all the burden of the promisor's inability to perform. This court presumes that a promisor enters into a contract with the belief that, in the event she can not perform, the best she can hope for is complete rescission and restitution.

Defendants want the court to apply a double standard by which they become the privileged party. Defendants want to be able to rescind and be absolved of their obligation to treat goodwill according to the accounting plans that the FHLBB approved; but they want plaintiff to be forced to possess the liabilities of the acquired thrifts and suffer the consequences of noncompliance with OTS's new capital standards. In the absence of clear evidence to the contrary, this court does not believe the parties intended such a result when they made their agreement. When a government agency enters into an agreement with another party that calls for a specific use of its executive powers, it is presumed, unless there is evidence to the contrary, that the parties did not intend either party to assume the risk that the agency would not continue to have the authority to make such use of its powers in the foreseeable future.

Defendants argue that the following language of FHLBB Resolution 85-223, which certified the [Bank] Board's approval of the merger with New Federal of Knoxville, indicates the parties' understanding that plaintiff assumed all risks that could result from any changes in the Board's regulations concerning the accounting of

goodwill: "[I]n accounting for the Merger, Charter shall use generally accepted accounting principles prevailing in the savings and loan industry, as accepted, modified, clarified or interpreted by applicable regulations of the [Bank] Board and the FSLIC . . . ." Exhibit 14 at 7. The court does not interpret this provision as allocating the risk of any future changes in the Board's regulations which might make the use of goodwill illegal. Under such a circumstance, performance of the contract would be illegal. It was quite possible that the Board could have modified its regulations without making performance of the contract illegal, and it seems more likely to this court that these were the circumstances contemplated by the parties when they agreed to the provision. The Board was reserving its right to modify its performance, not allocating the risk of losing its authority to perform.

The right to modify would exist even if the Board had not expressly stated it, because it is created by the doctrine of impossibility of performance due to a supervening law. The doctrine does not absolve a party from his or her obligation to perform simply because a new law unexpectedly makes performance more onerous. This is so even though the previously contemplated performance is now illegal and must be modified to be legally possible. There is a continuum of burden imposed by the necessity to modify which, at some point, becomes so overwhelming that a court will determine that substantial performance is no longer legal.

In the present case, it is obvious that if the defendants were to place plaintiff into receivership, performance would have been made illegal, since defendants would have deemed it illegal for plaintiff to operate the institution. It is also obvious that if the government bans all new loans and investments by plaintiff that the burden will be so onerous that the performance the parties had contemplated will be modified enough to become legally

impossible. Because defendants play the role of regulator as well as contracting party, they control the decision of whether performance will be modified enough to be legally impossible. Since defendants have not yet made this decision through concrete enforcement action, it is only appropriate for this court to make the declaratory judgment that if they make performance too burdensome for plaintiff in the future, plaintiff will have the right to rescind the contract.

In *Fla. Power & Light v. Westinghouse Elec. Corp.*, 826 F.2d 239 (4th Cir. 1987), the court ruled that a party to a contract who had promised to dispose of spent nuclear fuel through a reprocessing plant was absolved of its obligation because of a supervening change in the law which the parties had not anticipated. At the time they signed the contract, it was the policy of the United States Government to stimulate the nuclear power industry by assuring that it would provide facilities to reprocess spent fuel. The court ruled that when the Government unexpectedly retracted its policy the contract was abrogated because a basic assumption in it no longer existed. Like the present case, the Government pursued a policy that was intended to foster a private industry and encourage businesses to make contracts in reliance upon the continuation of the policy. The policy in both cases was a key element that supported the purpose of the contracts. When a supervening law unexpectedly retracted that policy, the court concluded that the contract should be rescinded.

The fact that the government is both the contracting party and regulator in the present case should not distinguish it from *Florida Power*. In *Horowitz v. United States*, 267 U.S. 458, 461 (1924), the Court ruled that the government

> when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts

> as a sovereign . . . . "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused . . . . In [Claims Court] the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."

Id., quoting *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865). If the government has dual characters when it is a defendant in a suit for contract damages caused by "its public and general acts," there is no reason why it should not have them in a suit for rescission of a contract due to "its public and general acts."

Defendants cite *Connolly v. PBGC*, 475 U.S. 211, 227 (1986), for its proposition that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Id.*, quoting *FHA v. Darlington, Inc.*, 358 U.S. 84, 92 (1958). Defendants believe this refutes plaintiff's request to rescind its contracts due to an unexpected intervening law which made their performance illegal.

In *Connolly*, the plaintiff administered a multi-employer pension trust which funded a pension plan and received contributions from employers pursuant to their respective collective bargaining agreements. Many of these agreements stipulated that the contributions negotiated under each collective bargaining agreement were an individual employers' only obligation to the pension plan. Many years after the trust was established, employers began withdrawing from the plan at a rate that threatened to leave it underfunded. Congress responded by enacting the Multi-employer Pension Plan Amendments Act of 1980

(MPPAA), which forced employers to continue making contributions to pensions plans after they had withdrawn from them. The explicit purpose of the law was to prevent pension plans from becoming underfunded due to employer withdrawal. The Supreme Court agreed that the law contradicted the collective bargaining agreements because it placed an additional, unanticipated liability on the employers who negotiated contributions to their respective pension plans. Since the MPPAA only applied to existing pension plans and did not require employers to create them, the employers would never have been subject to the statutory liability of the Act had they never agreed to contribute to the pension plans in the first place.

The plaintiff in *Connolly* only argued a takings claim against the government. It could have claimed that the MPPAA constituted an unexpected supervening law that abrogated collective bargaining agreements because it contradicted the provisions which stipulated the employers' obligations. It could have requested that the Court rescind the contractors and place the parties in the status quo ante when no pension plans existed. The Supreme Court rejected the plaintiff's taking claim, and this court will assume for the sake of argument that the Court would have also rejected a rescission claim by applying the same rule quoted by defendants—that those who do business in a regulated field are on notice that the law may change against their interests.

Even if the Court had been dealing with a rescission claim, *Connolly* would still not be applicable to the present case. As the Court's legislative history of the MPPAA showed, Congress was explicitly addressing the problem of employers withdrawing from their pension plans. Allowing them to rescind the contracts that gave rise to their pension plans would have blatantly thwarted the policy of the MPPAA. In the present case, this court accepts defendants' argument that Congress intended to abrogate the agreements which specified the capital

standards under which plaintiff would operate. Unlike *Connolly*, there is nothing in the record, defendants' arguments, or the legislative history of FIRREA that suggests returning the parties to the status quo ante would violate a policy of Congress.[2] As stated elsewhere in this opinion, nothing in this court's order gives plaintiff an entitlement to use goodwill according to the standards of the previous regulatory regime, restricts the government from enforcing the provisions of FIRREA concerning capital standards and the use of goodwill, or otherwise qualifies the government's ability to amend its laws which regulate the thrift industry. The order merely requires the government to treat the savings and loan associations acquired in the 1982 and 1985 mergers as separate entities for the purposes of enforcing new regulations that make plaintiff's contracts with the FHLBB illegal and would not be applicable but for the use of supervisory goodwill permitted by those contracts.

CONCLUSION

For reasons set forth above, the court grants the following declaratory relief to the plaintiff:

(1) That plaintiff entered into a contract for the use of supervisory goodwill, and any enforcement action by

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[2] The same reasoning also makes *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (POSSE) inapplicable to the present case. The controversy in POSSE arose after Congress passed an amendment to the Social Security Act which authorized states to execute agreements with the Secretary of Health and Human Services that would provide social security coverage for their employees. The amendment specifically allowed the states to terminate these agreements, and twenty years after the amendment was passed states began doing so at a rate which alarmed members of Congress. In response, Congress rescinded the provision allowing states to terminate their agreements. The Court rejected the plaintiffs' claim that the agreements were unconstitutionally abrogated. As was the case in *Connolly*, the Congressional policy which gave rise to the controversy would have been thwarted had the Court allowed the plaintiffs to rescind their agreements.

OTS or FDIC that substantially burdens plaintiff's operations, and which would not be taken by OTS or FDIC but for the use of supervisory goodwill according to the terms of the contract, will rescind the contract and return the institutions to their status quo ante for the purpose of such enforcement action. After the contract is rescinded, OTS and FDIC shall treat the savings associations that were merged with the plaintiff in 1982 and 1985 as separate entities for the purposes of such enforcement action.

(2) It is inappropriate to determine at this stage what kind of enforcement action will "substantially burden" the plaintiff's operations because such a determination should be made only after a hearing. The court rules, however, that conservatorship or receivership, or a ban on all loans and investments imposes a substantial burden.

(3) This case will remain open on the court's docket in order to give defendants the opportunity to decide what kind of enforcement action they want to pursue, and to give the plaintiff the opportunity to request a hearing in which the court will decide whether such enforcement action rescinds the contract pursuant to paragraph (1).

(4) As a result, the Temporary Restraining Order filed August 2, 1991 is moot, and hereby rescinded. There is no need for the preliminary injunction hearing scheduled for August 12, 1991.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTERED: This 16th day of August 1991.

/s/ GLEN M. WILLIAMS
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

Civil Action No. 91-0012-A

CHARTER FEDERAL SAVINGS BANK,
110 Piedmont Avenue
P.O. Box 668
Bristol, Virginia 24203,
Plaintiff,

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION,
in his own official capacity and as
successor in interest to
FEDERAL HOME LOAN BANK BOARD,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its own capacity and as
successor in interest to
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
Defendants.

ORDER

[Filed August 16, 1991]

In accordance with the Memorandum Opinion entered this date, the following declaratory relief is granted:

(1) That plaintiff entered into a contract for the use of supervisory goodwill, and any enforcement action by OTS or FDIC that substantially burdens plaintiff's operations, and which would not be taken by OTS or FDIC

but for the use of supervisory goodwill according to the terms of the contract, will rescind the contract and return the institutions to their status quo ante for the purposes of such enforcement action. After the contract is rescinded, OTS and FDIC shall treat the savings associations that were merged with plaintiff in 1982 and 1985 as separate entities for the purposes of such enforcement action.

(2) It is inappropriate to determine at this stage what kind of enforcement action will "substantially burden" plaintiff's operations because such a determination should be made only after a hearing. The court rules, however, that conservatorship or receivership, or a ban on all loans and investments imposes a substantial burden.

(3) This case will remain open on the court's docket in order to give defendants the opportunity to decide what kind of enforcement action they want to pursue, and to give plaintiff the opportunity to request a hearing in which the court will decide whether such enforcement action rescinds the contract pursuant to paragraph (1).

(4) This Order makes the Temporary Restraining Order filed August 2, 1991 moot, and it is hereby rescinded. There will be no hearing for a preliminary injunction on August 12, 1991.

The Clerk is directed to send certified copies of this Order to counsel of record.

ENTER: This 16th day of October, 1991.

/s/ Glen M. Williams
Senior U.S. District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ABINGDON

Civil Action No. 91-0012-A

CHARTER FEDERAL SAVINGS BANK,
Plaintiff

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, ETC., *et al.*,
Defendants

ORDER

[Filed October 16, 1991]

This case is again before the court on motions of the plaintiff and defendants to clarify this court's order of August 16, 1991. The defendants have moved also for the court to reconsider its memorandum opinion and order. After reviewing the motions and briefs and hearing oral argument, the court is of the opinion that all of the said motions are without merit and accordingly all motions and parties now pending before the court are hereby overruled.

Certified copies hereof shall be mailed to counsel of record.

ENTER: This 16th day of October, 1991.

/s/ Glen M. Williams
Senior U.S. District Judge

APPENDIX E

RELEVANT PROVISIONS OF THE RECOVERY ACT

SECTION 301 (relevant portion codified at 12 U.S.C. 1464(t)(3)):

(3) TRANSITION RULE.—

(A) Certain Qualifying Supervisory Goodwill Included In Calculating Core Capital.—Notwithstanding paragraph 9(A), an eligible savings association may include qualifying supervisory goodwill in calculating core capital. The amount of qualifying supervisory goodwill that may be included may not exceed the applicable percentage of total assets set forth in the following table:

For the following period:	The applicable percentage is:
Prior to Jan. 1, 1992	1.500 percent
Jan. 1, 1992-Dec. 31, 1992	1.000 percent
Jan. 1, 1993-Dec. 31, 1993	0.750 percent
Jan. 1, 1994-Dec. 31, 1994	0.375 percent
Thereafter	0 percent

Supreme Court, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

No. 92-1142

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHARTER FEDERAL SAVINGS BANK, PETITIONER

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether federal regulators promised a savings institution that it could use supervisory goodwill, an intangible asset, to satisfy regulatory capital standards without regard to subsequent statutory changes in the governing regulatory framework.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1142

CHARTER FEDERAL SAVINGS BANK, PETITIONER

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 976 F.2d 203. The opinion of the district court (Pet. App. 24a-59a) is reported at 773 F. Supp. 809.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1992. A petition for rehearing was denied on October 27, 1992. See Pet. App. 22a. The petition for a writ of certiorari was filed on January 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Charter Federal Savings Bank was created as the result of a series of acquisitions approved by the Federal Home Loan Bank Board (Bank Board) in the 1980s. In 1981, petitioner's predecessor, First Federal Savings and Loan of Bristol, Virginia, agreed to merge with two other troubled Virginia savings institutions, First Federal Savings and Loan of New River Valley, and Peoples Federal Savings and Loan of Roanoke. Pet. App. 5a; see Pet. 3 n.1. That merger was approved in January 1982 by the Bank Board, which permitted the resulting institution (now renamed Charter) to treat the negative net worth of the acquired thrifts as an intangible asset, called "supervisory goodwill," for purposes of satisfying regulatory capital requirements. Pet. App. 5a-6a.[1] Petitioner informed its regulators that it planned to amortize over 40 years (later reduced to 25 years) the supervisory goodwill resulting from the merger with New River and Peoples. *Id.* at 6a & n.3.

In 1985, petitioner agreed to acquire New Federal Savings and Loan, an institution created from five failed thrifts in Knoxville, Tennessee. Pet. App. 6a-7a & n.4. As in 1982, the Bank Board permitted petitioner to treat the difference between the value of the thrifts and the price it paid to purchase them (some $15 million) as supervisory goodwill, which

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[1] Permitting acquiring thrifts to treat supervisory goodwill as an asset to be amortized over an extended period enabled the institutions to absorb the negative tangible net worth of the institutions they acquired without running immediately afoul of regulatory capital standards. Pet. App. 4a.

petitioner is amortizing over a 15-year period. *Id.* at 7a. Later the same year, petitioner acquired another failed Knoxville thrift, Magnolia Federal Savings and Loan. *Ibid.* Petitioner again treated the supervisory goodwill thereby generated (amounting to only $24,000) as a regulatory asset to be amortized over 15 years. *Ibid.*

2. In 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. As part of a wide-ranging reform of federal regulation of the nation's savings and loans, FIRREA abolished the Bank Board and replaced it with the Office of Thrift Supervision (OTS). In addition, amid substantial criticisms of the "capital gimmicks" that had led to the savings and loan crisis, H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 310 (1989), Congress placed severe restrictions on the use of supervisory goodwill as an asset to satisfy regulatory capital standards. Thrifts were required, *inter alia*, to phase out over five years the use of supervisory goodwill to satisfy the statute's "core capital" standards, 12 U.S.C. 1464(t)(3)(A),[2] and to amortize the supervisory goodwill included in core capital annually at a rate that would lead to full amortization in a maximum of 20 years, 12 U.S.C. 1464(t)(9)(B). Thrifts were also prohibited from using supervisory goodwill at all to

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[2] All references in this brief to provisions of Title 12 of the United States Code are to the United States Code (Supp. III 1991).

satisfy the statute's "tangible capital" standard. 12 U.S.C. 1464(t)(9)(C).[3]

With supervisory goodwill excluded, petitioner had a negative net worth of approximately $19 million. Pet. App. 8a n.6. It therefore submitted a capital plan, as required by the new statute, describing the manner in which it proposed to increase its capital to achieve compliance with regulatory standards. See 12 U.S.C. 1464(t)(6)(A)(ii)(II). OTS rejected petitioner's capital plan as inadequate and based on optimistic operating projections, and refused to grant the institution a discretionary exemption from the regulatory standards. Pet. App. 8a-9a.

3. Petitioner thereafter filed suit in federal district court against OTS and the Federal Deposit Insurance Corporation (FDIC), alleging that it had binding contracts with the government permitting it to treat supervisory goodwill as an asset for purposes of satisfying regulatory capital standards. Among other things, petitioner sought a declaration that its rights to use supervisory goodwill had been preserved by FIRREA, or in the alternative, that FIRREA

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[3] In Congress's view, goodwill was "one of the remaining poisons of the savings and loan industry" (135 Cong. Rec. 12,068 (1989) (Rep. Price)), and its use was entirely antithetical to the goal of requiring greater thrift capital. See generally *Transohio Savings Bank* v. *Director, Office of Thrift Supervision*, 967 F.2d 598, 603-604 (D.C. Cir. 1992). As Senator Bradley explained, rather than reflecting the value of a thrift's franchise, "goodwill has come to mean the difference between the liabilities and the assets of a thrift, less the capital that the acquiring interest is willing to contribute. The effect is perverse—the weaker a thrift, the more goodwill it creates. This is just wrong." 135 Cong. Rec. 18,856 (1989).

frustrated the essential purpose of its prior acquisitions, permitting those acquisitions to be rescinded. Pet. App. 9a-10a.

After dismissing the government's threshold jurisdictional objections (Pet. App. 34a-45a), the district court found that petitioner and its regulators had formed an implied contract regarding the use of supervisory goodwill, that the contract was abrogated by FIRREA, and that rescission was an appropriate remedy. The court stated that by approving petitioner's "accounting proposals," the Bank Board had made an "implicit promise" to the institution to permit it to treat supervisory goodwill as a regulatory asset, to be amortized over an extended period of time. *Id.* at 46a. The court "recognize[d] that the [Bank Board] did not promise not to alter its regulations in the future," but found that fact relevant only to determining the appropriate remedy. *Id.* at 46a-47a.

The court rejected petitioner's claim that FIRREA exempted institutions with such agreements from the operation of the supervisory goodwill restrictions, upholding as "plausible" the respondents' contrary interpretation of the statute. Pet. App. 47a-51a. However, the court stated, if respondents' application of FIRREA made performance of the contract illegal, which would occur if petitioner were placed in receivership or all new loans and investments were banned, rescission would be an "appropriate remedy." *Id.* at 51a, 54a-55a. The court therefore ordered that government enforcement actions predicated on the exclusion of supervisory goodwill that "sub-stantially burden[ed]" petitioner's operations "will rescind the contract and return the institutions to their status

quo ante for the purposes of such enforcement action." *Id.* at 60a-61a.[4]

4. The court of appeals reversed. The court first agreed that the district court had jurisdiction over petitioner's suit against OTS, but found that "the tentative nature of the FDIC's involvement" rendered petitioner's claims against that agency "not ripe." Pet. App. 12a-14a.[5]

On the merits, the court of appeals expressed serious doubts whether a contract existed at all. The court noted that "no express, written contract exists between the parties," observing that the relevant Bank Board resolutions "merely granted that agency's approval of the merger[s] and the accounting practices employed by [petitioner] in connection therewith." Pet. App. 17a. The court therefore distinguished the case before it from others involving claims to binding contracts regarding supervisory goodwill, which "involved written agreements between the complaining thrift and the [Bank Board]." *Ibid.* However, the court found it unnecessary to

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[4] The court did not define what sorts of enforcement actions would constitute a "substantial burden" on petitioner's operations, other than making clear that placing the institution in conservatorship or receivership, or banning all loans or investments, would qualify. Pet. App. 61a. The court also did not explain how the contract could be rescinded, other than stating that OTS and FDIC would have to "treat the savings associations that were merged with plaintiff in 1982 and 1985 as separate entities." *Ibid.*

[5] The court of appeals declined to decide whether the lower court's order constituted an injunction that, under the statute, the lower court would not have had jurisdiction to enter. Pet. App. 15a.

decide whether there was a contract, because it determined that the terms of any such contract did not include the commitment on which petitioner based its case. *Id.* at 18a.

The court noted that the Bank Board "never expressly waived its right to enforce further regulations governing supervisory goodwill"; instead, the Bank Board approved petitioner's use of supervisory goodwill "under its then statutory discretion to permit such accounting practices." Pet. App. 20a. But, although "the [Bank Board] assured petitioner that its use of supervisory goodwill was permissible under the then current law and that the [Bank Board] would approve such practices under such law," it had "made no explicit promise to [petitioner] of continued approval throughout the life of the amortization period," regardless of any change in statutory requirements. *Ibid.* Relying on decisions of the Eleventh and D.C. Circuits in similar supervisory goodwill cases, the court concluded that "[w]ithout a more explicit promise," it would not "enlarge the scope of guarantees given to [petitioner]." *Ibid.* (citing *Transohio Savings Bank* v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992); *Guaranty Financial Servs., Inc.* v. *Ryan*, 928 F.2d 994 (11th Cir. 1991)).[6]

The "highly regulated nature of the savings and loan industry," including regulatory requirements for capital adequacy, which "have been an evolving

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[6] Petitioner notes (Pet. 18 n.8) that a petition for rehearing and suggestion for rehearing en banc were filed in *Transohio*. The petition and suggestion were denied on January 5, 1993, without any judge calling for a vote. *Transohio Savings Bank* v. *Director, OTS*, No. 91-5246 (D.C. Cir.).

part of the regulatory scheme since its inception," also persuaded the court that, "absent an explicit statement to the contrary, the [Bank Board] would not have intended to promise [petitioner] continued treatment of supervisory goodwill as capital for the life of the amortization period." Pet. App. 20a. The court noted that "the [Bank Board] would have expected changes in statutory requirements, including capital requirements" and the court found it "doubtful * * * that the [Bank Board] intended to secure to [petitioner] the use of supervisory goodwill over a fifteen to twenty-five year period." *Id.* at 20a-21a. As a savings and loan, the court observed, petitioner "certainly was cognizant of the regulatory intrusions into this business." *Id.* at 21a. The court concluded that, "[i]f [petitioner] wanted to avoid the risk of regulatory change, it could have demanded more explicit assurances." *Ibid.*[7]

ARGUMENT

The court of appeals correctly determined that government regulators never promised petitioner that it could treat supervisory goodwill as a regulatory asset, irrespective of subsequent statutory reforms. That determination, which is tied to the facts of this case, does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

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[7] Because it held that the Bank Board had not waived the right to enforce subsequent statutory changes in supervisory goodwill requirements, the court of appeals found it unnecessary to determine whether rescission would have been an appropriate remedy had the Bank Board contracted to waive its rights and then reneged on the bargain. Pet. App. 21a.

1. The court of appeals' decision is correct. As this Court has explained:

> "[S]overeign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." * * * Therefore, contractual arrangements, including those to which a sovereign itself is [a] party, "remain subject to subsequent legislation" by the sovereign.

Bowen v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 147-148 (1982)). Thus, "one who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms." *Western Fuels-Utah, Inc.* v. *Lujan*, 895 F.2d 780, 789 (D.C. Cir.), cert. denied, 111 S. Ct. 47 (1990).[8]

In light of that rule, it was entirely appropriate for the court of appeals to have refused to "enlarge the scope of guarantees given to [petitioner]." Pet. App. 20a. The court's conclusion was buttressed by a number of other factors, including the lack of any "express, written contract" between petitioner and

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[8] Accord *Transohio*, 967 F.2d at 618; *Guaranty*, 928 F.2d at 1001; *Peterson* v. *United States Department of Interior*, 899 F.2d 799, 807 (9th Cir.), cert. denied, 111 S. Ct. 567 (1990). See also *Great Lakes Higher Educ. Corp.* v. *Cavazos*, 911 F.2d 10, 16 & n.13 (7th Cir. 1990); *Education Assistance Corp.* v. *Cavazos*, 902 F.2d 617, 629 & n.20 (8th Cir.), cert. denied, 111 S. Ct. 246 (1990).

its regulators (*id.* at 17a); the absence of any "explicit promise" that petitioner would be entitled to continued approval of its regulatory accounting practices (*id.* at 20a); and the "highly regulated nature of the savings and loan industry," including the imposition of "evolving" capital requirements on industry participants (*ibid.*). Indeed, it would have been entirely unreasonable for any participant in the "highly regulated" thrift industry to have assumed that it could obtain by implication the rights that petitioner asserts it was granted here.

Although petitioner suggests that it "never would have" agreed to the 1982 and 1985 acquisitions without assurances that it would be able to treat supervisory goodwill as capital over an extended period of time (Pet. 4), the court of appeals reasonably presumed that petitioner could have "accounted for the risk of regulatory change" in deciding whether or not to acquire the failing thrifts. Pet. App. 21a. Petitioner was fully represented by counsel in the various transactions, and, had it deemed assurances concerning future statutory change indispensable, it should have demanded "more explicit assurances." *Ibid.*[9] "[I]n effect," thrifts like petitioner "wager[ed] the chance that the rules would be changed against the potential return if they were not." *Transohio*, 967 F.2d at 620 (quoting *Guaranty*, 928 F.2d at 999). Having lost its wager, petitioner cannot complain about changes that Congress found necessary to

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[9] Ironically, petitioner in fact obtained—at least in a letter from the Bank Board—just such an express assurance concerning regulatory forbearance. See Pet. App. 17a n.11. But that express assurance by its terms expired in 1990.

protect the public interest in a sound savings and loan industry.

The decision below is firmly supported by the D.C. Circuit's decision in *Transohio Savings Bank* v. *Director, OTS, supra*, and the Eleventh Circuit's decision in *Guaranty Financial Servs., Inc.* v. *Ryan, supra*, both of which rejected claims by thrifts to contracts with the federal government regarding supervisory goodwill in similar circumstances. As in this case, the *Transohio* and *Guaranty* courts refused to find that the federal government had promised to immunize a party from future changes in federal law unless such a right is expressed in "unmistakable terms." *Transohio*, 967 F.2d at 618; *Guaranty*, 928 F.2d at 1001.

Petitioner attempts to distinguish *Transohio* and *Guaranty* on the ground that they involved claims for injunctive relief, not rescission. Pet. 18. But the form of relief sought is beside the point. The issue in each case, as in the decision below, was whether the facts peculiar to the case demonstrate that the thrift obtained a contract right to the use of supervisory goodwill as regulatory capital over a specified time period, regardless of any subsequent statutory change. The question of remedy would arise only if such a contract right were found to exist. Like the courts in *Transohio* and *Guaranty*, the court of appeals in this case did not reach any remedial issue precisely because it found that no such right had been granted.

2. Petitioner asserts (Pet. 11-13) that the decision below conflicts with decisions of several district courts, as well as decisions of the Court of Federal Claims. Initially, each of the cases cited by petitioner

involves distinct transactions, and a decision that banking authorities entered into, and later breached, a contract concerning supervisory goodwill in one case would not lead to the same conclusion on the entirely different facts of another case. In any event, the Court does not ordinarily grant review to resolve a conflict between a court of appeals' decision and one or more trial court decisions. Review would be particularly inappropriate here, because three courts of appeals have reached the relevant issues, and they are all in agreement.[10]

3. This case need not be held pending the Court's decision in *Cisneros* v. *Alpine Ridge Group*, No. 92-551 (to be argued March 30, 1993). *Alpine Ridge* involves contracts between the Department of Housing and Urban Development and private housing developers. It presents questions concerning the interpretation of the contracts and the scope of any substantive due process limits on legislation that modified them.

This case is unlikely to be affected by this Court's resolution of the issues in *Alpine Ridge*. The court of appeals ruled that whatever contract could have

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[10] We note that one of the trial court decisions cited by petitioner (*Ensign Financial Corp.* v. *FDIC*, 785 F. Supp. 391 (S.D.N.Y. 1992)) was overturned on February 16, 1993, after reconsideration. The others are currently on appeal. See *Winstar Corp.* v. *United States*, No. 92-5164 (Fed. Cir.) (argued Jan. 6, 1993); *Security Federal Savings & Loan Ass'n of Albuquerque* v. *FSLIC*, 796 F. Supp. 1435 (D.N.M. 1991), appeals filed, Nos. 93-2002, 93-2015 & 93-2016 (10th Cir.); *Far West Federal Bank, S.B.* v. *Director, Office of Thrift Supervision*, 787 F. Supp. 952 (D. Or. 1992), appeals filed, Nos. 92-35597 & 92-36535 (9th Cir.).

been formed in this case did not include the crucial promise on which petitioner relies. This case, unlike *Alpine Ridge*, thus presents no question concerning the circumstances under which Congress may abrogate vested contract rights.

Nor do the contract interpretation issues in *Alpine Ridge* have any relevance to this case. In *Alpine Ridge*, the parties contest the proper interpretation of particular, express contract provisions governing the private contractors' authority to impose annual rent increases. See *Alpine Ridge Group* v. *Kemp*, 955 F.2d 1382, 1387 (9th Cir.) (contract provisions "unambiguously stated in * * * the contracts themselves"), cert. granted, 113 S. Ct. 490 (1992) (No. 92-551). In this case, petitioner's argument rests on speculation concerning the content of an alleged unwritten, non-express "contract" governing supervisory goodwill. There is no reason to believe that the interpretation of the housing subsidy contracts in *Alpine Ridge* will provide any guidance in interpreting whatever contract petitioner could claim was formed in this case. Indeed, the court of appeals in *Alpine Ridge* took care to distinguish decisions—such as the one here—which "declined to interpret contracts as containing implied provisions foreclosing the exercise of sovereign power by the government." 955 F.2d at 1386.

4. Finally, although the court of appeals did not reach these questions (Pet. App. 15a, 21a), there are two additional grounds that independently support the court of appeals' judgment.

First, the district court exceeded its jurisdiction by entering what was in effect an injunction prohibiting enforcement actions by the thrift

regulatory agencies. Specifically, the district court required that, if OTS or FDIC sought to take enforcement action against petitioner predicated on FIRREA's restrictions on the use of supervisory goodwill which would "substantially burden[]" petitioner's operations, the agencies must treat petitioner's various merged predecessors "as separate entities for the purposes of such enforcement action." Pet. App. 60a-61a. In other words, the district court directed the agencies to refrain from enforcing FIRREA's supervisory goodwill restrictions against petitioner *in its existing form*. As such, the order was precluded by 12 U.S.C. 1464(d)(2)(B), (D)—which prohibits the courts from restraining the authority of the OTS Director to appoint a conservator or receiver for a thrift—and 12 U.S.C 1818(i)(1)—which prohibits the courts from affecting by "injunction or otherwise" the issuance or enforcement of any notice of charges or enforcement order issued by either OTS or FDIC. See *First Federal Savings Bank & Trust* v. *Ryan*, 927 F.2d 1345, 1355-1356 (6th Cir.) (Section 1464(d)), cert. denied, 112 S. Ct. 187 (1991); *Board of Governors* v. *MCorp Financial, Inc.*, 112 S. Ct. 459, 463-466 (1991) (Section 1818(i)).

Second, rescission would have been an inappropriate remedy in any event under the circumstances presented by this case. As a matter of law, the defense of impossibility of performance requires, among other things, the "*unexpected* occurrence of an intervening act." *Opera Co. of Boston, Inc.* v. *Wolf Trap Foundation for Performing Arts*, 817 F.2d 1094, 1102 (4th Cir. 1987) (emphasis added). Here, however, as the court of appeals found (Pet. App. 20a-21a), changes in thrift capital standards were hardly

unexpected. There are also important practical objections to rescission and restoration of the parties to the "status quo ante." *Id.* at 61a. The mergers at issue in this case were completed in 1982 and 1985, at which time the assets of the merged institutions were commingled and petitioner was operated as a single thrift. After so long a period of time, it would be impossible for government regulators to treat the merged institutions "as separate entities." *Ibid.* Thus, even if government regulators had made a binding commitment to petitioner regarding supervisory goodwill, the district court had no power to order long-completed mergers to be rescinded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-1142

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CHARTER FEDERAL SAVINGS BANK,
Petitioner,

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY MEMORANDUM TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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REPLY MEMORANDUM TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

The government has never disputed that it was the Federal Home Loan Bank Board ("FHLBB") that initiated the mergers in question, that it sought out Charter and requested that Charter merge with four troubled institutions that would otherwise have been seized and liquidated by federal regulators.[1] Petition at 4a, 6a, 7a.

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[1] The government implies that Charter itself was a troubled institution. *See* Resp. Br. at 2 (emphasis supplied) (noting that Charter agreed to merge with "*other* troubled Virginia savings institutions."). The implication is wrong, and is not supported anywhere in the record.

In fact, Charter intially declined to merge because assumption of the liabilities of the troubled thrifts would have rendered Charter insolvent and subject to an immediate government takeover. Petition at 5a. It was only after Charter negotiated specific assurances from the FHLBB that it could use the purchase method of accounting and treat the acquired institutions' deficit net worth as an intangible asset that Charter finally agreed to merge with the failing thrifts. Petition at 5a, 6a-7a.[2]

As a result of the mergers and in reliance on the terms of its agreement with the government, Charter assumed $62 million more in liabilities than in assets, and relieved the government of what would otherwise have been an expensive bailout of four savings and loans. Having reaped the windfall of Charter's acquisitions, *i.e.*, Charter has eliminated the majority of the deficit net worth it inherited, the government has instructed Charter that it can no longer treat the unamortized supervisory goodwill as a regulatory capital asset, leaving the 73 year old institution in noncompliance with the capital requirements and subject to seizure the moment the court of appeals' mandate is issued. The question before this Court is whether the government may repudiate its contractual obligations to Charter without according Charter a remedy.

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[2] The government quotes certain congressmen who characterize the purchase method of accounting as an "accounting gimmick" and as a "poison[]" of the industry. Resp. Br. at 3, 4 n.3. But it was the offer of supervisory goodwill that induced Charter to acquire four failing thrifts and to assume their substantial liabilities. As a result, the government was freed from the obligation to seize and liquidate these thrifts, and to pay tens of millions of dollars to the insured depositors. All the while, Charter has been in the process of eliminating the $62 million deficit net worth it inherited. In this context, it is apparent that the offer and use of supervisory goodwill, far from causing any losses, has inured to the benefit of the government and to the insurance fund. In any event, it was the government, not Charter, that created the concept and offered the use of goodwill as an asset to lure healthy savings associations to merge with their weaker sister institutions.

ARGUMENT

1. Charter seeks certiorari, in part, to resolve a conflict between the Fourth Circuit's decision in the instant case and the Ninth Circuit's decision in *Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992), *cert. granted*, 113 S. Ct. 490 (U.S. Nov. 16, 1992) (No. 92-551) (argument set for March 30, 1993). Petition at 9-10. Both cases pertain to the scope of the government's power to repudiate its contractual obligations, and address whether the government may exercise this power with impunity. Because this Court granted certiorari in *Alpine Ridge* and is hearing argument later this month, Charter requested that, if this Court is not inclined to grant Charter's petition at this time, the Court defer consideration of the petition until resolution of *Alpine Ridge*.

The government, in response, attempts to diminish the significance of *Alpine Ridge* and the conflict between the two circuits. Its attempts, however, are disingenuous and unavailing. For example, the government inexplicably relies on the Fourth Circuit's finding that Charter never secured an express promise that its right to treat supervisory goodwill as a regulatory capital asset would survive statutory changes, as if this fact distinguishes the case from *Alpine Ridge*. Resp. Br. at 12-13. To the contrary, Alpine Ridge likewise did not secure an express promise that the terms of its agreement would remain intact in the face of contrary legislation. But where the Fourth Circuit determined that the contract's silence regarding the effect of future legislation was fatal to Charter's claim, the Ninth Circuit found that the plaintiffs were entitled to a remedy.

The government further suggests that *Alpine Ridge* is irrelevant because the issues therein revolve around a different statute and a different contract. Resp. Br. at 12. However, the Ninth Circuit plainly held as a matter of law that *Bowen v. Public Agencies Opposed to Social Se-*

curity Entrapment, 477 U.S. 41 (1986), does not preclude *non-injunctive* relief to *any* plaintiff whose contract with the government has been frustrated by subsequent legislation. In direct conflict with *Alpine Ridge*, the Fourth Circuit, purportedly relying on *Bowen*, created "an additional, special rule of contract construction" applicable whenever the government is a party to an agreement. Petition at 18a. According to this "special rule," Congress can repudiate contracts to which the sovereign is a party without according a remedy to the aggrieved party. The Fourth Circuit's "special rule" transcends the facts in *Charter*, applies to every contract to which the government is a party, and is simply irreconcilable with the Ninth Circuit's holding. Given the broad implications of this conflict, review of the Fourth Circuit's decision is especially appropriate.

While the government states that "[t]his case need not be held" pending resolution of *Alpine Ridge*, Resp. Br. at 12, it never even intimates that such a brief delay would prejudice the public interest. In light of Charter's strong earnings, *e.g.*, Charter increased its tangible net worth in excess of $10 million last year alone,[3] it is difficult to discern, and the government fails to explain, how the public could be ill-served by deferring consideration of the petition until after *Alpine Ridge* is decided.

2. Arguing that this Court "does not ordinarily grant review to resolve a conflict between a court of appeals' decision and one or more trial court decisions," Resp. Br. at 12, the government dismisses out of hand two district court decisions[4] and three decisions from the federal court

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[3] *See* Affidavit of E.L. Byington, Jr. at ¶ 3 (Nov. 2, 1992) (attached to Charter's Motion to Stay Mandate filed in Court of Appeals on Nov. 2, 1992).

[4] *See Far West Federal Bank, S.B. v. Director, Office of Thrift Supervision*, 787 F. Supp. 952 (D. Or. 1992); *Security Federal Savings and Loan Association of Albuquerque v. Federal Savings and Loan Insurance Corporation*, 796 F. Supp. 1435 (D.N.M. 1991). The

with the most experience deciding contract cases against the government, the Court of Federal Claims.[5] Each of these cases applied *Bowen* in the manner urged by Charter here. These decisions, and the analyses therein, therefore strongly support Charter's conclusion that the Ninth Circuit's application of *Bowen* is correct, that the Fourth Circuit's application of *Bowen* is incorrect, and that the question on appeal is of significant national interest. Moreover, if one or more of these cases is affirmed on appeal, the respective plaintiff or plaintiffs would be entitled to substantial damages, a result greatly at odds with the almost certain seizure of Charter absent review by this Court.

3. While the government applauds the court of appeals' holding and stands by the court of appeals' reliance on *Bowen*, the government never addresses the context in which *Bowen* was decided or the stark differences between *Bowen* and the instant case, even though these differences were raised in Charter's petition.

First, *Bowen* involved a party's challenge of Congress' power to amend a statute. Charter, in contrast, does not contest Congress' authority to pass FIRREA and abrogate contracts. Rather, Charter submits, as the Ninth Circuit has found, that Congress' power to repudiate its own contractual obligations does not permit it to do so with impunity. *See Alpine Ridge*, 955 F.2d at 1385 (citation omitted) ("Here, the owners do not challenge Congress's power to amend the terms of the underlying

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government notes that another district court case, *Ensign Financial Corporation v. Federal Deposit Insurance Corporation*, 785 F. Supp. 391 (S.D.N.Y. 1992), dismissed the rescission count on reconsideration. *See Ensign*, No. 90 Civ. 5692, slip op. (Feb. 16, 1993). Even on reconsideration, however, the district court expressly rejected the government's interpretation of *Bowen*, *see id.* n.2, instead reversing on other grounds.

[5] *See Statesman Sav. Holding Corp. v. United States*, 26 Cl. Ct. 904 (Cl. Ct. 1992); *Winstar Corp. v. United States*, 25 Cl. Ct. 541 (1992); *Winstar Corp. v. United States*, 21 Cl. Ct. 112 (1990).

legislation in the exercise of 'public and general acts of a sovereign'.").

Second, this Court expressly found in *Bowen* that the term of its alleged contract revoked by Congress was *not*:

> a term over which the State had any bargaining power or for which the State provided independent consideration.

Bowen, 477 U.S. at 55. The agreement in *Bowen*, therefore, did not rise to a property interest protected by the Fifth Amendment. The contract here, in contrast, involves a bargained-for contractual right paid for with valuable consideration. *See also Alpine Ridge*, 955 F.2d at 1385 ("[The owners] assert that their contract rights are supported by independent consideration and are therefore vested under the Supreme Court's decisions in *Lynch* . . . and *Perry* . . . ."); *Acacia Villa v. Kemp*, 774 F. Supp. 1240, 1248 (C.D.Cal. 1990) ("[*Alpine Ridge*] falls into the category of cases that the *Bowen* Court was careful to distinguish. . . . The [respondents'] contracts are not gratuities; rather, they are bargained-for agreements, for which [respondents] paid valuable consideration. . . .").

Third, an analysis of the structure of the *Bowen* decision further undermines the Fourth Circuit's application of this Court's holding. The *Bowen* language relied upon by the Fourth Circuit is found in Part A of this Court's opinion. On its face, that language merely stands for the proposition that contracts cannot preclude Congress from passing corrective legislation unless the sovereign has unmistakably waived its right to do so. The Fourth Circuit, however, went beyond *Bowen*, concluding that Part A of *Bowen* also stands for the proposition that the government is relieved from any obligation to remedy its breach. Consistent with its misreading of *Bowen*, the Fourth Circuit found no need to address the issue of remedy:

> Given our holding, we need not rule on the appropriateness of rescission as a remedy.

Petition at 21a.

This Court, however, in Part C of the *Bowen* opinion, directly addressed the remedy question, concluding that no remedy was required because the right at issue did not arise from a contract. In sum, the court of appeals below found that it need not address Charter's right to a remedy even though this Court plainly found that the sovereign's right to pass legislation repudiating contracts does not, in and of itself, relieve the government of its obligation to remedy the breach.[6]

4. The government claims that the decision below is "firmly supported" by *Guaranty Fin. Serv., Inc. v. Ryan*, 928 F.2d 994 (11th Cir. 1991), and *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992). Resp. Br. at 11. Consistent with Charter's reading of *Bowen*, however, both of these decisions applied the *Bowen* doctrine to cases in which the plaintiff sought *injunctive* relief that would tie Congress' hands and preclude it from breaching certain contracts. These cases, then, reaffirm the Ninth Circuit's interpretation of *Bowen*, and highlight the very distinction Charter has discussed above. *Indeed, the Fourth Circuit is the first court to apply the* Bowen *doctrine in a manner that precludes a plaintiff from obtaining relief other than injunctive relief. Neither this Court nor any other court of appeals has interpreted* Bowen *so broadly.*

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[6] The government not only failed to respond to differences between *Bowen* and the facts here, but it likewise failed to address Charter's concern that the court of appeals' interpretation of *Bowen* would render all government contracts illusory and unenforceable. *See* Petition at 17-18; *see also Murray v. Charleston*, 96 U.S. 432, 445 (1877) ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.").

5. The government relies on the court of appeals' gratuitous "findings" that "the FHLBB would not have intended to promise Charter continued treatment of supervisory goodwill as capital for the life of the amortization period," and that "it [is] doubtful . . . that the FHLBB intended to secure to Charter the use of supervisory goodwill over a fifteen to twenty-five year period." Petition at 20a-21a. Because "the interpretation of contractual language to discern contractual intent is a question of fact," *Painewebber Inc. v. Hartmann*, 921 F.2d 507, 510 (3d Cir. 1990),[7] and since there has never been an evidentiary hearing in the case, the Fourth Circuit's decision to rely upon what it believes were the government's intentions was error. The court of appeals' factual determinations are all the more inappropriate given the deposition testimony of Thurman Connell, the former Senior Vice President of the Federal Home Loan Bank of Atlanta.[8]

6. Finally, the government inexplicably includes in its opposition to Charter's petition two "additional grounds that independently support the court of appeals' judgment," even though the government acknowledges that the court of appeals did not address these issues, and that these questions are not ripe for this Court's consideration. Resp. Br. at 14. These issues were heavily briefed below, and in light of the current posture of these questions,

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[7] *See also Dawson v. General Motors Corp.*, 977 F.2d 369, 373 (7th Cir. 1992); *Jhaver v. Zapata Off-Shore Co.*, 903 F.2d 381, 384 & n.6 (5th Cir. 1990) (and cases cited therein).

[8] Mr. Connell testified that Charter and the government entered into "an agreement," that "the Bank Board had accepted it and they were willing to be bound by the terms that they had agreed to." Petition at 4-5. The court of appeals' "findings of fact" also ignored the context of the deal, that the Federal Savings and Loan Insurance Corporation was in desperate financial condition, that Charter's agreement to merge with the four troubled thrifts saved the government tens of millions of dollars, and that the extended amortization period was "the engine that made th[ese] transaction[s] go." Petition at 3-5.

Charter will not rehash the arguments here.[9] If this Court determines that the court of appeals erred in holding that *Bowen* relieves the government from according a remedy for Congress' repudiation of government contractual commitments, the court of appeals will have its opportunity on remand to address the issues raised but not addressed on appeal.

Respectfully submitted,

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[9] Suffice it to say that, while the government contends that the district court's order was an injunction in excess of the district court's statutory authority, the disrict court's order was actually a declaratory judgment. *See* Petition at 35a-36a ("This judgment is not restraining the government from acting or compelling it to act or expending public funds. It merely states the legal effect of actions it may take."). Even if the order could somehow be distorted into an injunction, neither 12 U.S.C. § 1464(d)(2) nor 12 U.S.C. § 1818(i) precludes injunctive relief *prior* to the appointment of a conservator or receiver. *See* Petition at 42a-45a. Moreover, resolution of the government's other argument, *i.e.*, that it would be impractical to effect rescission, would necessitate an evidentiary hearing.